38604

8/60
51

CHARLES R. SMITH,

Appellant,

v.

GORDON C. THORNE and R. E. SCHMIDT,

Appellees.

APPEAL FROM

275 I.A. 627

SUPERIOR COURT

~~726 I.A. 575~~

COOK COUNTY.

Opinion filed May 2, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment of the Superior Court of Cook County for costs entered against him in an action brought by plaintiff against defendants for rent alleged to be due and owing. Trial was before the court without a jury.

On July 23rd, 1928, plaintiff leased a flat at 3314 Sheridan Road, Chicago, Illinois, to Katherine C. Thorne for a term extending from October 1st, 1928, to September 30th, 1930, for a rental of $20,160.00, or $840.00 per month. Katherine C. Thorne died on April 4th, 1930, after paying the April rent. Defendants are the executors of her estate. It is claimed that the defendants occupied the premises from May 1st, 1930, to September 30th, 1930, inclusive, and are liable for the rent for that period.

There are three counts to the declaration: Count 1 is based on a claim that plaintiff demised the premises to the defendants at a rental of $840.00 per month; count 2 alleges that the premises were demised to Katherine C. Thorne, that the defendants were appointed executors of the last will and testament of Katherine C. Thorne, and as such took possession of the demised premises and held the same for the period mentioned, and count 3 is indebitatus assumpsit, and proceeds on the theory that there is an implied promise by defendants to pay the rent for the period mentioned. The court held that defendants were liable as executors, but not personally.

38806

CHARLES S. WHITE,

Appellant,

v.

GORDON S. THORNE and R. A. BORNIER,

Appellees.

Opinion filed May 2, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment of the Superior Court of Cook County for costs entered against him in an action brought by plaintiff against defendants for rent alleged to be due and owing. Trial was before the court without a jury.

On July 25th, 1928, plaintiff leased a flat at 3434 Sheridan Road, Chicago, Illinois, to Katherine G. Thorne for a term extending from October 1st, 1928, to September 30th, 1930, for a rental of $[illegible]0,120.00, or $440.00 per month. Katherine G. Thorne died on April 6th, 1930, after paying the April rent. Defendants are the executors of her estate. It is claimed that the defendants occupied the premises from May 1st, 1930, to September 30th, 1930, inclusive, and are liable for the rent for that period.

There are three counts to the declaration: Count 1 is based on a claim that plaintiff demised the premises to the defendants at a rental of $440.00 per month; count 2 alleges that the premises were leased to Katherine G. Thorne, that the defendants were appointed executors of the last will and testament of Katherine G. Thorne, and as such took possession of the demised premises and held the same for the period mentioned, and count 3 is indebitatus assumpsit, and crosses on the theory that there is an implied promise by defendants to pay the rent for the period mentioned. The court held that defendants were liable as executors, but not personally.

Chapter 80 of Cahill's Illinois Revised Statutes, 1933, Section 1, provides:

> "That the owner of lands, his executors or administrators, may sue for and recover rent therefor, or a fair and reasonable satisfaction for the use and occupation thereof, by action of debt or assumpsit, in any court of competent jurisdiction, in the following case: * * * 3. When lands are held and occupied by any person without any special agreement for rent."

Defendants' defense is that they are not personally liable for the rents claimed for the reason that they did not enter into possession of, use, or occupy the premises after the death of the testatrix, and that in any case they are liable only as executors. The record shows that Katherine C. Thorne was an occupant of the premises in question at the time of her death.

The janitor of the building in question testified in substance that some of the furniture belonging to Katherine Thorne was taken out shortly after Mrs. Thorne's death, but that a large proportion of it was left there until October 4th, 1930, and that Mrs. Thorne's cook and laundress remained in the apartment until the last of September, 1930.

One Deena Lau, Mrs. Thorne's housekeeper, testified in substance that after the death of Mrs. Thorne, she remained in her room in the apartment, and that the defendant, Gordon C. Thorne, said to her, "You can just as well stay there because I have to pay the rent * * * until the lease expires."

Arthur D. Welton, an attorney-at-law, testified that he had a conversation with Thorne about the rent and that Thorne agreed to pay it.

Edward J. Lindahl, a real estate and renting agent, testified that at the time in question apartments of the type referred to rented for $800.00 per month.

It was stipulated by the parties that a claim for the rent for this apartment for the months involved, was filed in the estate of Katherine C. Thorne, deceased.

Docket No. 6, Wheeler's Illinois Civil Statutes, 1924.

Section 1. provides:

> "That the owner of lands, its executors or administrators, may sue for and recover rent therefor, or a fair and reasonable satisfaction for the use and occupation thereof, by action of debt or assumpsit, in any court of competent jurisdiction, in the following cases: " " ". When lands are held and occupied by any person without any express agreement for rent."

Defendants' defense is that they are not personally liable for the rents claimed for the reason that they did not cause into possession of, use, or occupy the premises after the death of the testatrix, and that in any case they are liable only as executors. The record shows that Katherine S. Thorne was in occupant of the premises in question at the time of her death.

The janitor of the building in question testified in substance that some of the furniture belonging to Katherine Thorne was taken out shortly after the Thorne's death, but that a large proportion of it was left there until October 6th, 1937, and that was. Thorne's come and laundress remained in the apartment until the last of September, 1937.

One Deena Lee, the Thorne's housekeeper, testified in substance that after the death of Mrs. Thorne, she remained in her room in the apartment, and that her relations, Lorene C. Thorne, said to her, "Now you just go on and stay right because I want to pay the rent " " " until the lease expires."

Arthur C. Nelson, an attorney-at-law, testified that he had a conversation with Lorene about the rent and that Lorene agreed to pay it.

Edward J. Kimball, real estate and auction sales, testified that at the time in question apartments of the type referred to rented for $80.00 per month.

It was estimated by the parties that - allow for the rent for this apartment for the months involved, - filed in the estate of Katherine S. Thorne, deceased.

The defendant, Gordon C. Thorne, testified in substance that he is one of the executors of the estate of Katherine C. Thorne, and that he went to this apartment shortly after his mother's death, and told the janitor, Borlum, that he, Thorne, desired that all the furniture in the apartment should be moved immediately, and that when he, Thorne, visited the place a few weeks later, it had all been moved, except a few old things, which he told the janitor he could have. Thorne further stated that he did not visit the servants quarters, and knew nothing as to their occupancy or content at that time. He denied that he had seen or talked to Deena Lau, the witness who testified that Thorne had told her she might remain in the room until October 1st. Thorne also testified that this witness, Deena Lau, came to Thorne and that he gave her some money. He stated he did nothing about getting the furniture out, but left that to his wife, and that it was all out by May 1st, 1930.

It is insisted that if defendants are liable at all, it is as executors of the estate of Katherine Thorne.

In the case entitled In Re Estate of Thurber, 311 Ill. 211, an appeal was taken from a judgment of the Appellate Court of this district, affirming a judgment of the Circuit Court of Cook County, dismissing a petition filed against the estate of Winfield Scott Thurber. At the time of Thurber's death on September 24th, 1913, he was the lessee of premises in Chicago for a term ending April 30th, 1919. After his death, his widow was appointed executrix of his estate and continued the business for a considerable period. The petition prayed that the rental for the period occupied by the widow be allowed as an expense against the estate. The petition was denied by both the Probate and the Circuit Court from which an appeal was taken to the Supreme Court, which said:

> "An executor has no power, in such capacity, to create a debt against the estate of the deceased, and debts created after the death of the testator cannot be filed as claims against his estate. (3 Schouler on Executors, 6th ed. sec. 2457; Dinsmoor v. Bressler, 164 Ill. 211.)"

The defendant, Gordon C. Thorne, testified in substance that he is one of the executors of the estate of [illegible] C. Thorne, and that he went to this apartment shortly after his mother's death, and told the janitor, Orlando, that he, Thorne, desired that all the furniture in the apartment should be moved immediately, and that when he, Thorne, visited the place a few weeks later, it had all been moved, except a few old things, which he told the janitor he could have. Thorne further stated that he did not visit the premises earlier, and then noticing as to their occupancy or so that at that time. He denied that he had sent or talked to Mrs. Lee, the witness who testified that Thorne had told her she might remain in the room until October 1st. Thorne also testified that this witness, Mrs. Lee, came to Thorne and that he gave her some money. He stated he did nothing about getting the furniture out, but left that to his wife, and that it was all out by May 1st, 1920.

It is insisted that if defendants are liable at all, it is as executors of the estate of [illegible] Thorne.

In the case entitled *In re Estate of Thurber*, 211 Ill. 611, an appeal was taken from a judgment of the appellate court of this district, affirming a judgment of the circuit court of Cook County, dismissing a petition filed against the estate of Infield Scott Thurber. At the time of Thurber's death on September 6th, 1912, he was the lessee of premises in Chicago for a term ending April 30th, 1912. After his death, his widow was appointed executrix of his estate and continued the premises for a considerable period. The petition proved that the rent for the period occupied by the widow be allowed as an expense against the estate. The petition was denied by both the probate and the circuit court from which an appeal was taken to the supreme court, which said:

> "An executor has no power, in such capacity, to create a debt against the estate of the deceased, and debts so created after the death of the testator cannot be filed as claims against his estate. (2 Schouler on Executors, 6th ed. sec. 1287; Simmons v. Gressler, 184 Ill. 611.)"

From the language of this opinion, and appellee cites nothing to the contrary in this state, it must be conceded that defendants here are not liable as executors. The question to be determined then is, are defendants liable under the Landlord and Tenant Act, if they occupied these premises themselves, or if they permitted the premises to be occupied by the servants of Katherine Thorne, and permitted a substantial portion of her household furniture to remain in the premises for the period mentioned, as the record indicates?

In 24 C. J. 147, under the title of 'Landlord and Tenant', is the following:

> "It has been laid down as the rule that the representative who takes possession under a lease to his decedent is personally liable for rent accruing." citing Howard v. Heinerschit, 16 Hun. (N.Y.) 177.

In the case 16 Hun. here cited, suit was brought against defendant, who was executrix of her deceased husband's estate. At the time of decedent's death, he occupied certain premises under a lease, the terms of which extended beyond the time of his death. The widow continued to occupy the premises after her husband's death, and the court said:

> "I am of opinion that the defendant is liable * * *, The facts found by the court below show that she entered not as executrix, but as legatee. The term was given to her, and she occupied a portion of the demised premises as a place of business until the tenancy ceased. * * *"

As executors of the estate of Katherine Thorne, these defendants had a duty with reference to the premises in question. It was their duty to vacate the premises and cease the use of it if they did not intend to pay the rent. The evidence adduced seems to indicate that they did not regard this duty, but on the contrary participated and acquiesced in the possession and use of the premises for the time alleged, and if this is true then under the authorities, they should be charged with a reasonable rent for the time possession was so retained. In view of the fact that the trial court held that defendants were not individually liable, the cause is reversed and remanded for a new trial.

REVERSED AND REMANDED.

WILSON AND HEBEL, JJ. CONCUR.

From the language of this opinion, and especially since nothing, to the contrary in this state, it must be conceded that defendants were not liable as executors. The question to be determined then is, are defendants liable under the landlord and tenant act, if they occupied these premises themselves, or if they permitted the premises to be occupied by the servants of Ambrosine Thorne, and permitted a substantial portion of her household furniture to remain in the premises for the period mentioned, as the record indicates?

In 24 O. L. 127, under the title of 'Landlord and Tenant', is the following:

> "It has been laid down as the rule that the representative who takes possession under a lease to his decedent is personally liable for rent accruing." citing Grand v. Leinkerschi, 10 Hun. (N.Y.) 177.

In the case in Hun. here cited, suit was brought against defendant, who was executrix of her deceased husband's estate. At the time of decedent's death, he occupied certain premises under a lease, the terms of which extended beyond the time of his death. The widow continued to occupy the premises after her husband's death, and the court said:

> "I am of opinion that the defendant is liable * * *. The facts found by the court below are that she entered not as executrix, but as lessee. The term was given to her, and she occupied a portion of the demised premises as a place of business until the tenancy ceased. * * *"

As executors of the estate of Ambrosine Thorne, these defendants had a duty with reference to the premises in question. It was their duty to vacate the premises or cease the use of it if they did not intend to pay the rent. The evidence adduced seems to indicate that they did not perform this duty, but on the contrary appropriated the possession and use of the premises for the time being, and if this is true then under the authorities, they seem to be charged with a reasonable rent for the time possession was so retained. In view of the fact that the trial court held that defendants were not individually liable, the cause is reversed and remanded for a new trial.

WILSON AND MCGILL, JJ. CONCUR.

DISSENTING OPINION.

36638

CHICAGO TITLE & TRUST COMPANY,

v.

AUGUST GUTTROFF, et al.,

On the Appeal of William A. Sheehan, Receiver,

IN RE:
JOSEPH FLEMING and WILLIAM H. FLEMING,

(Petitioners) Appellees,

v.

WILLIAM A. SHEEHAN, RECEIVER,

(Defendant) Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

275 I.A. 627

Opinion filed May 2, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal, William A. Sheehan, receiver, seeks to have an order of the Circuit Court of Cook County reversed. By this order, he is directed to pay Joseph and William Fleming the sum of $1,052.61. This receiver was appointed in a proceeding to foreclose a real estate mortgage. The petitioners are the owners of certain other tracts of real estate. The petition upon which the order appealed from was entered, was filed in the foreclosure proceeding, and recites in substance, that petitioners are the owners of real estate in Cook County; that on May 14th, 1931, a check in the sum of $1,052.61 was drawn, payable to the order of Joseph B. McDonough, County Collector, signed by petitioners, and then given to the National Tax Appraisal Company to be applied toward the payment of the 1929 taxes levied on the properties of petitioners, as shown on the tax books of the County Collector; that the officials of the National Tax Appraisal Company, acting as the agent of William A. Sheehan, receiver, contrary to the instructions of petitioners, wrongfully converted said check to their own use, and used the same to pay the taxes for 1929 levied on property of which William Sheehan was receiver; that the check of petitioners bears the endorsement

Opinion filed May 2, 1934

of the County Collector with the volume and item number on the back thereof, which corresponds with the volume and item number of the County Collector, and that the check shows that payment was made on June 23rd, 1931, debited to the account of petitioners, and that the records of the tax collector show payment of $1,052.61 made by the check of the petitioners; that petitioners have no interest in the William A. Sheehan receivership property, never gave instructions that their check should be used in payment of the taxes thereon, nor was it the intention of petitioners that their check should be so used.

It is further recited in this petition that petitioners claim a prior lien on the premises, of which Sheehan is receiver, for $1,052.61, with interest thereon from June 23rd, 1931, and petitioners pray for a rule on receiver to pay the said sum with interest. The receiver filed an answer to the petition, and upon a hearing, an order was entered, from which this appeal is taken.

The order with its recitals, is as follows:

> "The petitioners were owners of several buildings in Chicago; that on May 14, 1931, petitioners drew a check for $1,052.61 to the order of County Collector, delivered said check to National Tax Appraisal Co. with instructions to pay same to County Collector on 1929 taxes of petitioners, who wrongfully converted said check to their own use and used same to pay taxes on said receivership property; that said check bears endorsement of County Collector and was applied by him on 1929 taxes of the Sheehan receivership property in which petitioners have no interest; that said check was charged to account of petitioners on June 29th, 1931; that payment of $1,052.61 was made on said receivership property, in which petitioners have no interest; that petitioners gave no instructions that their check should be applied on receivership property, and that petitioners did not intend it to be so applied; that demand for repayment was made on said Sheehan.
>
> That Sheehan, receiver, issued his check for the payment of taxes on the receivership property to the order of said Appraisal Co., which retained the proceeds of said receiver's check, and that said Appraisal Co. exhibited to said receiver the paid tax bill on said receivership property prior to receiver paying said receiver's check. It is therefore ordered that said receiver pay petitioners $1,052.61."

of the County Collector with the volume [illegible] the number of the [illegible] thereof, which corresponds with the volume and [illegible] number of the County Collector, and that the check above [illegible] on June 22nd, 1931, [illegible] to the records of [illegible], and that the records of the tax collector show payment of [illegible] made by the check of the petitioners; that petitioners are [illegible] in the amount [illegible] properly, never [illegible] tions that their check should be used in payment of the taxes thereon nor was it the intention of petitioners that their check should be so used.

It is further stated [illegible] petitioners claim a prior lien on the remainder, if [illegible] is worthless, for $1,000.00, with interest thereon from June 22nd, 1931, and petitioners pray for [illegible] the extent [illegible] interest. The receiver filed an answer to the petition, and upon a hearing, an order was entered, from which this appeal is taken.

The order with its recitals, is as follows:

> "The petitioners were owners of several buildings in Chicago; that on July 14, 1931, petitioners [illegible] check for $1,000.00 to the order of County Collector, delivered said check to National City Bank; [illegible] the County Collector on [illegible] of petitioners, [illegible] used same to pay taxes on said property; [illegible] that said check [illegible] County Collector; [illegible] was [illegible] by the [illegible] property in which petitioners have an interest; that said [illegible] check in [illegible] 1931; that [illegible] $1,000.00 [illegible] petitioners have no [illegible] property, in which said [illegible] be liable [illegible] County, and that [illegible] ment was made [illegible] petitioners.
>
> That therefore, [illegible] of taxes on the [illegible] property, [illegible] property [illegible] check, and that [illegible] the said tax [illegible] receiver paying [illegible] order [illegible] that the receiver [illegible] petitioners [illegible]

The question is raised here as to the right of the receiver to prosecute this appeal. Neither the complainant in the foreclosure proceeding, nor anyone interested in the funds held by the receiver are parties to this appeal.

In Foreman v. Defrees, Brace & Ritter, 120 Ill. App. 486, this court said:

> "Nor is the order appealed from, one from which the receiver of the Building & Loan Association has any right to appeal. He was an officer of the court. The assets of the corporation were under the control of the court and he as receiver had no personal interest in the question whether the assets in his hands should go to the appellees or to his co-appellant. It is only from orders affecting his compensation or from orders refusing to allow items in his account that a receiver may appeal. Haigh v. Carroll, 197 Ill. 193; Stevens v. Hadfield, 178 id. 538; Sutton, Receiver v. Weber, 100 Ill. App. 360.
>
> In Chicago Title & Trust Co. Receiver v. Caldwell, 58 Ill. App. 219, as in this case, the bill was to dissolve a corporation. The receiver of the corporation appealed from an order allowing a claim against the corporation and ordering that it be paid pro rata with the claims of other general creditors, and the court dismissed the appeal at the personal costs of the appellant. In the opinion in that case Mr. Justice Gary said: 'The point has not been made by counsel for the appellee, but we cannot sanction even by silence the idea that a receiver may set up in opposition to the court his theory of how the assets shall be disposed of.'
>
> There is in this case no formal motion to dismiss, but we are disposed to follow the precedent established by the case last cited, and of our own motion dismiss the appeal of both appellants."

See also Haigh v. Carroll, 197 Ill. 93.

In view of the fact that no one having an interest in the funds held by the receiver is a party to this appeal upon the authority of the cases cited, the appeal will have to be dismissed.

APPEAL DISMISSED.

WILSON AND HEBEL, JJ. CONCUR.

The question is raised here as to the right of the receiver to prosecute this appeal. Neither the government in the forecloseure proceeding, nor anyone interested in the funds held by the receiver are parties to this appeal.

In Peterson v. Bateman, Bunce & Martin, 147 Ill. 544, 548, this court said:

> "Nor is the order appealed from, one from which the receiver of the building & loan association has any right to appeal. He was an officer of the court. The assets of the corporation were under the control of the court and he as receiver had no personal interest in the question whether the assets in his hands should go to the creditors or to his co-appellant. It is only from orders affecting his compensation or from orders directing to whom funds in his possession shall be paid that a receiver may appeal. Kenyon v. Stewart, 147 Ill. 124; Peterson v. Bateman, 147 Ill. 544; Bates, Receiver v. Bates, 147 Ill. 471, 475.
>
> In Chicago Title & Trust Co. Receiver v. Kimball, 201 Ill. 405, 416, we in turn said, 'We will not be thought a sorrowful alloway, it is a right to be protected and secure it be said to be with the claims of other parties, and the creditors, and they are benefited the result of the proceeds of the receiver. In the matter in hand cited, Justice Gary said: 'The court has not been wrong by sometimes for the appellee, but it is not material even if it appears the law that a receiver may not be in controversy on the court his theory of the law is a well or a general.'
>
> There is in this case no fact to allege to claimed, and we disagree to follow the rule set established by the same last cited, or of any other decision limiting the right of a receiver to appeal.'

See also Kenyon v. Stewart, 147 Ill. 124.

In view of the fact that no one having a interest in the funds held by the receiver is a party to this appeal and in authority of the cases cited, the appeal will be dismissed.

Appeal dismissed.

36679

EDWARD VAN DER MOLEN,
(Plaintiff) Appellant,
v.
CHICAGO RAPID TRANSIT COMPANY,
a Corporation,
(Defendant) Appellee.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

275 I.A. 627[3]

Opinion filed May 2, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against plaintiff for costs in an action in which it is charged that plaintiff suffered damage to his motor truck through the negligence of defendant. The trial was had by the court without a jury. The finding of the court was that the defendant was not guilty.

Plaintiff filed a declaration containing two counts. The first count alleges in substance that defendant operates a railroad running on the surface of the ground, and that this railroad intersects 57th Court in the Town of Cicero; that plaintiff's agent, while in the exercise of ordinary care, was driving a motor truck south on 57th Court across defendant's tracks, a train on defendant's road running in a westerly direction, was carelessly, improperly, negligently and recklessly operated by defendant, and that it struck and damaged plaintiff's automobile. The second count is similar to the first, except that the negligence alleged is that defendant had previously provided railroad gates and had stationed a watchman at the intersection named, but that at the time of the accident, defendant failed to lower its gates, and failed to give plaintiff any warning of the approach of the train. Defendant's plea was not guilty.

Matthew Voss, the driver of the truck, testified in substance that he was engaged in the business of removing garbage from certain places, and that on the day in question September 25th, 1929, at about 6:45 in the morning he was driving this truck, which weighed about 7½ tons, south on 57th Court in the Town of Cicero; that he saw

[illegible]

[illegible] VAN DUZER,

(plaintiff) respondent,

v.

CHICAGO [illegible] TRANSIT COMPANY,
a corporation,

(defendant) appellant.

[illegible]

[illegible]

Opinion filed May 3, 1934

MR. PRESIDING JUSTICE [illegible] delivered the opinion of the court.

This is an appeal from a judgment against plaintiff for costs in an action in which it is claimed that plaintiff suffered damage to his motor truck through the negligence of defendant. The trial was had by the court without a jury. The finding of the court was that the defendant was not guilty.

Plaintiff since a [illegible] collision occurring on [illegible]. The first count alleges in under one in a defendant operates a railroad running on the surface of the ground, and in a this railroad intersects 57th Court in the Town of Cicero; that plaintiff's agent, while in the exercise of ordinary care, was driving a motor truck south on 57th Court across defendant's tracks, a train on defendant's road running in a westerly direction, [illegible] negligently, improperly, negligently and recklessly operated by [illegible], and by it struck and damaged plaintiff's automobile. The second count is similar to the first, except that the negligence alleged in that defendant negligently [illegible] railroad [illegible] and [illegible] a [illegible] intersection [illegible], but [illegible] the time of the accident, defendant failed to lower its gates, and failed to give plaintiff any [illegible] of the approach of the train. Defendant's [illegible].

[illegible] Court, the driver of the truck, testified in substance that he was [illegible] in the business of [illegible] [illegible] place, and that on the morning in question [illegible], 1929, [illegible] 8:45 in the morning, he was driving this truck, which [illegible] 7½ tons, south on 57th Court in the Town of Cicero; that he was

the railroad track and looked to see if there was a watchman, but there was none, and that he did not hear any bell ringing. He also stated there were no gates at this crossing. He stated there is an alley north of the railroad track, and of some property belonging to the railroad and that the distance from the house north of the alley to the railroad track is about 18 to 20 feet. This is all open space. He further stated that he kept the truck slowly in motion as he approached the track, looked to the east and saw nothing, looked to the west and saw nothing, but that when he was about 3 or 4 feet from and almost on the track he saw the train coming west; that he put on his brakes and turned the truck west so that it was going with the train, and that the train struck and threw him out. This witness testified that he did not hear any whistle blowing, bells ringing, or receive any warning that a train was coming, and that the truck was carried 65 to 75 feet west after it was struck. The witness also stated that he had been driving a truck about six months before the accident, that he was familiar with the mechanism of the truck, that the brakes and other portions of it were in good condition, and that the truck could not exceed a speed of 15 miles an hour. He said he had driven over this railroad perhaps a thousand times; that defendant always had a watchman at this particular crossing with a flag, and that whenever he had occasion to cross the track, he heard a bell ringing. Voss was asked the following questions and gave the following answers:

"Q. As you approached the crossing, you knew that there was nobody working for the company on the crossing who was going to look east for you.

A. Yes, Sir.

Q. You knew you would have to do your own looking.

A. Yes, Sir.

Q. And you did?

A. Yes, Sir."

the railroad track and looked to see if there was a train, but there was none, and that he did not hear any bell ringing. He also stated there were no signs at this crossing. He stated there is an alley north of the railroad track, and of some property belonging to the railroad and that the distance from the house north of the alley to the railroad track is about 14 to 20 feet. This is all open space. He further stated that he saw the train slowly in motion as he approached the track. Looked to the east and saw nothing, looked to the west and saw nothing, but that when he was about 3 or 4 feet from and almost on the track he saw the train coming west; that he put on his brakes and turned the truck west so that it was going with the train, and that the train struck and threw him out. This witness testified that he did not hear any whistle blowing, bells ringing, or receive any warning that a train was coming, and that the truck was carried 3 to 5 feet west after it was struck. The witness also stated that he had a conversation having a truck six months before the accident, that he was familiar with the mechanism of the truck, that the brakes and other portions of it were in good condition, and that the truck could not exceed 5 miles or 10 miles an hour. He said he had traveled over this railroad crossing a thousand times; that defendant always had a watchman at this crossing for crossing with a flag, and that whenever he had occasion to cross the track, he saw a bell ringing. Poor was asked the following questions and gave the following answers:

"Q. As you approached the track, you knew that there was nobody waiting for the crossing or to warn you who was going to look out for you.

A. Yes, Sir.

Q. You knew you could look to be your own lookout.

A. Yes, Sir.

Q. And you did?

A. Yes, Sir."

On cross-examination this witness stated in substance that it was broad daylight at the time of the accident; that he had crossed this particular crossing about a half dozen times, and that he had seen a flagman at nearly all of the crossings of the roads in the Town of Cicero. He stated that when he approached the railroad, he saw the crossing sign, and that there was a bell, but that he did not know where it was. He listened for the bell and did not hear it. On redirect examination he said that always before when he had crossed at this particular crossing, there was a bell ringing and a watchman signaling. He said there was no red light which signaled "danger" at this particular crossing.

Carl G. Stears testified that he was employed by the International Harvester Company, and that plaintiff, the owner of the truck, had paid them $3,350.00 for its repair after the accident.

Joseph Dreyer, motorman of the train in question, called by defendant, testified in substance that there are no curves in the tracks of the road at or near the place in question; that there are signals at this crossing consisting of a bell and a light; that the bell is started by electricity, and that as he approached this crossing, the pilot light showed green, which indicated that he should go ahead; that when he reached 57th Court, the truck of plaintiff was going south and tried to go ahead of the train. He further testified that at the time of the accident, the weather was clear. This witness also testified that there was a pilot light between the tracks at the street intersection in question; that his train at the time was going from 18 to 20 miles per hour coasting, and that when he first saw the truck, it was about 35 feet from him and almost on the track, that he, the witness, had a clear view, and after the train hit the truck, the train ran about 10 feet. He further stated that as he approached the crossing, and as the truck was approaching, he, the motorman, sounded the whistle, and that the signal at the crossing

On cross-examination this witness stated in substance that it was broad daylight at the time of the accident; that he had crossed this particular crossing about a dozen times, and that he had seen a flagman at nearly all of the crossings of the tracks in the town of Sidero. He stated that when he approached the railroad, he saw the crossing sign, and that there was a bell, but that he did not know where it was. He listened for the bell and did not hear it. On redirect examination he said that always before when he had crossed at this particular crossing, there was a bell ringing and a watchman signaling. He said there was no red light which signaled "danger" at this particular crossing.

Carl G. Stearns testified that he was employed by the International Gravelator Company, and that Saturday, the owner of the truck, had paid them $3,150.00 for its repair after the accident.

Joseph Meyer, motorman on the train in question, called by defendant, testified in substance that there are no curves in the tracks of the road at or near the place in question; that there are signals at this crossing consisting of a red and a light; that the bell is operated by electricity, and that as he approached this crossing, the pilot light showed green, which indicated that he should go ahead; that when he reached the crossing, the train was going south and trying to stop the train. He further testified that at the time of the accident, the weather was clear. This witness also testified that there was a pilot light between the tracks on the street intersection in question; that his train at the time was going from 15 to 20 miles a per hour operating, [illegible] as first saw the truck, it was about 15 feet from the [illegible] crossing, that he, the witness, had a clear view, and [illegible] the train hit the truck, the train ran about 10 feet. [illegible] he had just [illegible] approached the crossing, and as the truck [illegible], the motorman, sounded the whistle, [illegible] the crossing

started working when the train was about 500 feet from the crossing. This witness testified that a watchman was maintained at this crossing in the day time, but not before 7 o'clock in the morning. This evidence was not contradicted.

J. J. O'Reilly, a civil engineer, employed by the defendant company, testified in substance that there is an automatic bell at the crossing in question; that the alley north of the railroad right of way is 16 feet wide; that from the northermost rail of the track on which the train was running west, to the south line of the alley is about 29 feet. On cross-examination, this witness stated that the green light testified to have been seen by the motorman, pointed down the track and indicated that the track was clear.

The allegation in the declaration upon which plaintiff relies is that at the time of the accident, defendant failed to lower its gates and failed to give plaintiff any warning of the approach of the train. There is no evidence that there were ever any gates at this crossing. There is evidence to the effect that at and before the time of the accident, signals at the crossing were working, both the lights and the bell. The driver's own testimony is to the effect that as he approached this crossing, he looked but saw no train coming. He says he saw no signals and heard no bell.

In Sheehan v. Chicago N. S. & M. R. Co., 269 Ill. App. 477, this court quoted the following cases with approval:

> "In Chicago & N. W. Ry. Co. v. Hatch, 79 Ill. 137, 139, the court approved an instruction as follows: 'Every person is bound to know that a railroad crossing is a dangerous place and he is guilty of negligence unless he approaches it as if it were dangerous. * * *'
>
> In Chicago & Alton R. Co. v. Gretzner, 46 Ill. 74,82, it was stated: 'What is the testimony on the part of plaintiff's negligence? * * *He knew, as all men are bound to know, such a crossing is a dangerous place and he should have approached it as such. This court has said it is the duty of persons about to cross a railroad, to look about them and see if there is danger, not to go recklessly upon the road, but to take proper precautions themselves to avoid accident at such places.'

started running when the train was about 300 feet from the crossing. This witness testified that a watchman was maintained at this crossing in the day time, but not before 7 o'clock in the morning. This evidence was not contradicted.

J. D. O'Reilly, a civil engineer, employed by the telephone company, testified in substance that if there is an automatic bell at the crossing in question; that the alley north of the railroad right of way is 10 feet wide; that from the northbound rail of the track on which the train was running west, to the south line of the alley is about 40 feet. On cross-examination, this witness stated that the green light testified to have been seen by the witness, pointed down the track and indicated that the train was close.

The allegation in the declaration upon which liability rests is that at the time of the accident, defendant failed to have its bell and failed to give, directly any warning of the approach of the train. There is no evidence that there was ever any notice at this crossing. There is evidence in the record that at and before the time of the accident, although at the crossing was working, both the lights and the bell. The driver's own testimony is to the effect that as he approached this crossing, he looked but saw no train coming. He says he was so alarmed that hearing the bell.

In Hudson v. Chicago & N. W. R. R. Co., 69 Ill. App. 477, this court quoted the following from the syllabus:

> 'In Chicago & N. W. R. R. Co. v. Hynes, 78 Ill. 197, 198, the court [illegible] instructions [illegible]: 'Every person is bound to use such precautions against injury, as a prudent person would use in the exercise of reasonable care under the circumstances in order to avoid injury.' [illegible]
>
> In Chicago & Alton R. R. Co. v. Pennell, 4 Ill. App. 94, it was stated: 'But in the statement of the court of trial, it was stated: 'He was, at the time, in the exercise of ordinary care, such a crossing as a prudent person and be should have exercised if he was.' [illegible] If it is the duty of persons about to cross a railroad, to look when and if there is danger, and to be reasonably careful, but to the proper precautions [illegible] to avoid accidents at such places.'

In Burns v. Chicago & Alton R. Co., 223 Ill. App. 439, at page 442, the court used the following language: 'It is a generally recognized fact that railroad crossings are dangerous places, and it is the settled law in this state that one who approaches a railroad crossing must approach it using an amount of care commensurate with the known danger.'"

It seems reasonably clear from the evidence, including certain photographs, that there was no obstruction of any sort which interfered with the driver of plaintiff's truck seeing a considerable distance down the railroad track in either direction, and his statement that he looked to ascertain whether or not a train was approaching, indicates that he did not at all rely upon a flagman to warn him of the approach of the train. The train was coming, and if he looked and did not see it, it was his own fault.

The court heard and saw the witnesses, and we can see no reason for disturbing the verdict. The judgment is, therefore, affirmed.

AFFIRMED.

WILSON, J. AND HEBEL, J. CONCUR.

In Dunne v. Chicago & Alton R. R., 245 Ill. 490, 492, at page 494, the court used the following language: "It is a generally recognized fact that railroad crossings are dangerous places, and it is the settled law in this state that one who approaches a railroad crossing must exercise ordinary care for his safety."

It seems reasonably clear from the evidence, including certain photographs, that there was no construction of any sort which interfered with the driver of Kimmell's truck seeing a considerable distance down the railroad track in either direction, and his statement that he looked to ascertain whether or not a train was approaching, indicates that he did not at all turn upon a figure to see him of the approach of the train. The train was coming, and if he looked and did not see it, it was to his fault.

The court heard the arguments, and we can see no reason for disturbing the verdict. The judgment is, therefore, affirmed.

AFFIRMED.

FILCOX, J., and DUNN, J., concur.

36668

ALINE L. FRIEBERG,

Complainant,

v.

FRANK FLOWER, et al,

Defendants.

MAMIE PARRIS, Administratrix of the Estate of MAGGIE McKIMMON, Deceased,

Defendant, Appellee,

v.

FRANK FLOWER,

Defendant, Appellant.

APPEAL FROM

CIRCUIT COURT

OF COOK COUNTY.

275 I.A. 628

Opinion filed May 2, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County by Frank Flower, defendant in a foreclosure proceeding, directing that certain moneys theretofore deposited with the Clerk of the Circuit Court, as alleged, be paid over to one Mamie Parris. Flower held the legal title to the property, which is being foreclosed, subject to a first mortgage.

From the record, it appears that on June 25th, 1929, Frank Flower and his wife entered into a contract with one Maggie McKimmon, by the terms of which Flower agreed to sell and convey to Maggie McKimmon the property in question, for the sum of $20,000, free and clear of encumbrances, of which sum a certain amount was to be paid at the time of the execution of the contract, and the balance in installments. By this contract it is further agreed that on February 1st, 1932, Flower would convey the premises to Maggie McKimmon upon her executing a mortgage for the unpaid balance due at that date, plus an additional 10%, provided payment of the installments had been made as agreed. After the bill herein was filed, and on motion of complainant in the foreclosure proceeding, the court on January 9th, 1930, entered an order that Maggie McKimmon; in lieu of making the

Opinion filed May 2, 1934

payments agreed to be made by her to Flower, should pay the sums as they became due under the contract to the Clerk of the Court, to wait the court's further order. It is recited in this order of January 9th, 1930, that Maggie McKimmon consented to the order.

On February 18th, 1930, a decree was entered in the foreclosure suit, wherein it is found in substance that Flower acquired title to the property in question on October 31st, 1925, subject to the mortgage being foreclosed; that the time for the payment of the mortgage was extended by agreement from time to time, and that there was a certain amount due and owing. In this decree, the court made a finding in which it recites the facts concerning the contract between Maggie McKimmon and Frank Flower, and that Maggie McKimmon, upon the execution of a deed by Flower to her of the premises, as agreed, would give a purchase money first and second mortgage sufficient to cover the balance then due, plus 10%, in lieu of all expenses, charges and commissions; that said first mortgage should be $7,000.00, payable at 7% per annum, and the second mortgage for the balance found then to be due, payable on or before 5 years from the date of the contract, with principal pre-payments of $60.00 per month. This finding further recites that the contract between the parties provided that in case Maggie McKimmon failed to make any of the payments as agreed, the whole amount should be due, and the decree ordered the sale of the premises to satisfy complainant's claim. Thereafter, on January 26th, 1931, the court entered an order directing the clerk of the court to pay over to the complainant the sum of $2,183.80 theretofore deposited with the clerk by Maggie McKimmon under the order of January 9th, 1930.

On March 3rd, 1932, Maggie McKimmon filed a petition in the cause wherein she alleges that between January 9th, 1930, and January 26th, 1933, she paid in to the clerk the sum of $2,183.80, which, as stated, was ordered paid over to the complainant, and that the

payments agreed to be made by her to Flower, should pay the same as they become due under the contract to the Clerk of the Court, to wait the court's further order. It is recited in this order of January 9th, 1930, that Maggie McKinnon consented to the order.

On February 18th, 1930, a decree was entered in the foreclosure suit, wherein it is found in substance that Flower acquired title to the property in question on October 21st, 1928, subject to the mortgage being foreclosed; that the time for the payment of the mortgage was extended by agreement from time to time, and that there was a certain amount due and owing. In this decree, the court made a finding in which it recites the facts concerning the contract between Maggie McKinnon and Frank Flower, and that Maggie McKinnon, upon the execution of a deed by Flower to her of the premises, as agreed, would give a purchase money first and second mortgage sufficient to cover the balance then due, plus 10%, in lieu of all expenses, charges and commissions; that said first mortgage should be $2,000.00, payable at $75 per annum, and the second mortgage for the balance found then to be due, payable on or before 6 years from the date of the contract, with prepaid pro-payments of $50.00 per month. This finding further recites that the contract between the parties provided that in case Maggie McKinnon failed to make any of the payments as agreed, the whole amount should be due, and the decree ordered the sale of the premises to satisfy complainant's claim. Thereafter, on January 25th, 1931, the court entered an order directing the clerk of the court to pay over to the complainant the sum of $2,181.30 thereafter deposited with the clerk by Maggie McKinnon under the order of January 9th, 1930.

On March 3rd, 1932, Maggie McKinnon filed a petition in the cause wherein she alleges that between January 9th, 1930, and January 18th, 1932, she paid in to the clerk the sum of $2,182.80, which, as stated, was ordered paid over to the complainant, and that the

premises were subsequently sold for the balance due under the decree; and that on the sale the amount bid was in excess of the balance due under the terms of the decree, including the expenses, that since the payment of $2,183.80, Maggie McKimmon had paid to the clerk of the court the sum of $536.70 on the Flower contract; that Flower had not redeemed from the mortgage sale and presumably cannot carry out his contract with her, therefore, she is entitled to the return of the money paid to her by the clerk in the sum of $536.70.

Thereafter, Maggie McKimmon died and it is alleged Mamie Parris was appointed her administratrix. It was upon the motion of Mamie Parris as administratrix, that the court ordered the payment of the money referred to, and from which order this appeal is taken.

It is the theory of defendant, Frank Flower, that (1) as there was no order substituting Mamie Parris as administratrix in place of Maggie McKimmon, deceased, nor any bill of any kind filed by said Parris, there was nothing on which to base any order to pay the money to Parris, alleged administratrix; (2) that as there was no master's report or certificate of evidence preserving any evidence and no finding of facts in the order appealed from, there is nothing in the record constituting a valid basis for the order directing the payment of the money; (3) that even if the recitals in the foreclosure decree and in the Parris answer to the petition for writ of assistance be considered to correctly set forth the contract of purchase and other facts with respect to performance of that contract, yet it did not appear that anyone other than said Frank Flower was entitled to the money deposited; and (4) that such money should have been ordered paid to said Frank Flower.

From the abstract filed by Flower, we gather that in his contract with Maggie McKimmon, he agreed that upon the payment of the amounts agreed to be paid thereby, he would convey to her the title to the property in question "free and clear from all encumberances."

premises were subsequently sold for tax delinquency under the decree; and that on the sale the amount old was in excess of the balance due under the terms of the decree, including the expenses, that minus the payment of $2,182.80, Maggie Kellerman had paid to the clerk of the court the sum of $98.70 on the flower contract; that Flower had not redeemed from the mortgage sale and presumably cannot carry out his contract with her, therefore, she is entitled to the return of the money paid to her by the clerk in the sum of $98.70.

Thereafter, Maggie Kellerman died and it is alleged Annie Harris was appointed her administratrix. It was upon the motion of Annie Harris as administratrix, that the court ordered the payment of the money referred to, and from which order this appeal is taken.

It is the theory of defendant, Frank Flower, that (1) as there was no order substituting Annie Harris as administratrix in place of Maggie Kellerman, deceased, nor any bill of any kind filed by said Harris, there was nothing on which to base any order to pay the money to Harris, alleged administratrix; (2) that as there was no master's report or certificate of evidence preserving the evidence and no finding of facts in the order appealed from, there is nothing in the record constituting a valid basis for the order directing the payment of the money; (3) that even if the results in the foreclosure decree and in the Harris lawsuit to the parties for want of assistance or compliance to correctly set forth the contract of purchase and other facts with respect to performance of that contract, yet it did not appear that suppose other than with Frank Flower was omitted to the money deposited; and (4) that such money should have been ordered paid to said Frank Flower.

From the abstract filed by Flower, he states that in his contract with Maggie Kellerman, he agreed that upon the payment of the amounts agreed to be paid thereby, he would convey to her the title to the property in question "free and clear from all encumbrances,"

There is nothing in the record to indicate that she defaulted in any of her payments, or in any of the terms of the contract. Before her death, under the order of the court, she had paid to the clerk of the court the sum of $2,183.80, which sum was, by further order of the court, entered on January 31st, 1931, paid over to the complainant in this case. Thereafter she paid the clerk the further sum of $536.70. The decree confirming the sale of the property in question was entered on February 11th, 1931. The order directing the $536.70, in dispute, to be turned over to Mamie Farris was entered on January 13th, 1933, almost 2 years after the order of sale and distribution was entered. Flower had allowed the period of redemption to expire, had lost the title to the premises he had agreed to convey, and could not carry out his contract. He has lost all interest in the premises involved, and whether Mamie Farris is administrator of Maggie McKimmon or not, is no concern of his. He has no interest in the fund in dispute.

The order of the Circuit Court is affirmed.

AFFIRMED.

WILSON AND HEBEL, JJ. CONCUR.

There is nothing in the record to indicate that she defaulted in any of her payments, or in any of the terms of the contract. Before her death, under the order of the court, she had paid to the clerk of the court the sum of $6,183.40, which sum was, by further order of the court, entered on January 21st, 1921, paid over to the complainant in this case. Thereafter she paid the clerk the further sum of $330.70. The decree confirming the sale of the property in question was entered on February 11th, 1921. The order directing the $326.70, in dispute, to be turned over to Wells Fargo was entered on January 13th, 1922, almost 2 years after the order of sale and distribution was entered. Never had allowed the period of redemption to expire, and lost the right in the premises he had agreed to convey, and could not carry out his contract. He has lost all interest in the premises involved, and whether Wells Fargo is administrator of Angela Wallace or not, is no concern of his. He has no interest in the fund in dispute.

The order of the Circuit Court is affirmed.

AFFIRMED.

FILSON (MS opinion), J.T. concurs.

36735

CALEDONIAN INSURANCE COMPANY OF SCOTLAND, FRANKLIN FIRE INSURANCE COMPANY OF PHILADELPHIA, PENNSYLVANIA, MECHANICS & TRADERS INSURANCE COMPANY OF NEW ORLEANS, LOUISIANA, UNION ASSURANCE SOCIETY, LTD., OF ENGLAND and SUN INSURANCE OFFICE, LTD., OF ENGLAND,

(Plaintiffs) Plaintiffs in Error,

v.

IMPERIAL ASSURANCE COMPANY OF NEW YORK, a Corporation,

(Defendant) Defendant in Error.

WRIT OF ERROR

MUNICIPAL COURT

OF CHICAGO.

275 I.A. 628

Opinion filed May 2, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in the Municipal Court of Chicago on a fire insurance policy. To plaintiffs' statement of claim, an affidavit of merits was filed by defendant.

On December 31st, 1932, plaintiff, by order of the court was given leave to file an amended statement of claim in 30 days from that date and the cause was continued until March 9th, 1933. On January 25th, 1933, the court entered an order dismissing the suit "for failure to file amended statement of claim." This was done without notice to plaintiff. On February 23rd, 1933, a petition was filed in which plaintiff prayed that the order dismissing the cause be vacated. On March 2nd, 1933, the court entered an order denying the prayer of the petition. The appeal here is from this order. No briefs are filed by defendant, appellee.

Plaintiffs' position is that the court was in error in dismissing the suit because of plaintiffs' failure to file an amended statement of claim. As stated, the case was dismissed without notice to plaintiff because of its failure to file an amended statement in 30 days from December 31st, 1932, and in this we are of the opinion that the court was in error.

MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, THE TRAVELERS COMPANY OF HARTFORD, CONNECTICUT, PENNSYLVANIA, MODERNAIRE A TRAVELERS INSURANCE COMPANY OF NEW YORK, NEW YORK, UNION AUTOMOBILE SOCIETY, LTD., OF ENGLAND and ONE LLOYDS UNDERWRITER, OF ENGLAND, (Plaintiffs) Plaintiffs in error, v. THE CITY COURT OF THE CITY OF NEW YORK, a Corporation, (Defendant) Defendant in error.	Writ of Error. Appeal from Appellate Court of Illinois.

Opinion filed May 2, 1934

Mr. Justice Jackson delivered the OPINION of the court:

Plaintiff used defendants in the municipal court of Chicago on a fire insurance policy. To plaintiff's statement of claim, an affidavit of merits was filed by defendant.

On December 21st, 1932, plaintiff, by order of the court was given leave to file an amended statement of claim [illegible] from that date and the cause was continued until March 4th, 1933. On January 30th, 1933, the court entered an order dismissing the suit "for failure to file amended statement of claim." This was done without notice to plaintiff. On February 22nd, 1933, a motion was filed in behalf of plaintiff asking that the order dismissing the cause be vacated. On March 6th, 1933, the court entered an order denying the prayer of the motion. The cause has been in the Appellate Court, No briefs are filed by defendant, appellee.

Plaintiffs' contention is that the court [illegible] eliminating the suit because of [illegible] statement of claim. A motion, the [illegible] to plaintiff's counsel of the filing of [illegible] statement in 30 days from December 21st, 1932. In this [illegible] that the court was in error.

In W. C. R. R. CO., v. Kieczorek, 151 Ill. 590, the Supreme Court said:

> "After obtaining such leave, [to file an amended declaration] the plaintiff was in no wise obliged to exercise the privilege given and make the amendment, and until the amendment was in fact made, the declaration in all respects remained the same, as though no leave to amend it had been given. Ogden v. Town of Lake View, 121 Ill. 422."

The trial court set the case for March 9th, 1933, and it had no right to dismiss it on January 25th, 1933, without notice to plaintiff. The cause is reversed and remanded with the direction that the order of dismissal be vacated.

REVERSED AND REMANDED WITH DIRECTIONS.

WILSON AND HEBEL, JJ. CONCUR.

In *L. J. A. C. v. Lemarque*, 151 111. 520, the Supreme Court said:

> "After obtaining such leave, [to file an amended declaration] the plaintiff was in no wise obliged to exercise the privilege given and make the amendment, and until the amendment was in fact made, its declaration in all respects remained the same, as though no leave to amend it had been given. *Dalton v. Lyon of Lake View*, 151 111. 422."

The trial court set the case for March 8th, 1951, and it had no right to dismiss it on January 25th, 1951, without notice to plaintiff. The cause is reversed and remanded with the direction that the order of dismissal be vacated.

REVERSED AND REMANDED WITH DIRECTION.

HILDEBRANDT, P. J. and MCGURE, J. concur.

36887

M. M. SUGG,

Appellee,

v.

ERWIN KOSTKA,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

275 I.A. 628[3]

Opinion filed May 2, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

M. M. SUGG, plaintiff brought suit in the Municipal Court of Chicago against Erwin Kostka for damages alleged to have been sustained to plaintiff's automobile in a collision between the automobiles of plaintiff and defendant at the intersection of Mannheim and Joliet roads in Cook County. A statement of claim was filed by plaintiff and an affidavit of merits by defendant. The cause was submitted to a jury which returned a verdict for plaintiff upon which the judgment was entered from which this appeal is taken. It is suggested in the record that the defendant in this case, prior to the filing of the suit herein, had brought suit against the plaintiff here for damages arising out of the same accident, and that the two cases were tried together. The record contains no pleadings in the latter case, nor anything else to indicate that such a suit is pending, or that if pending, they were tried and submitted to the jury as one case, except a statement to that effect in the bill of exceptions, so that we will here consider only the case of Sugg v. Kostka, the instant case.

Mannheim Road runs north and south and crosses Joliet Road, which runs in a northeasterly and southwesterly direction at approximately right angles. At about 9 o'clock on the evening of July 22nd, 1932, plaintiff Sugg was driving his car northeasterly on the Joliet Road, and defendant Kostka was driving south on Mannheim Road.

Hilmer A. Sass was produced as a witness for plaintiff Sugg.

38887

E. N. 9320.

Appellee,

v.

ELVIN KOSTKA,

Appellant.

APPEAL FROM

APPELLATE COURT

OF ILLINOIS.

275 I.A. 628

Opinion filed May 2, 1934

MR. PRESIDING JUSTICE JAMES DELIVERED THE OPINION OF THE COURT.

E. N. SUPP, plaintiff brought suit in the municipal Court of Chicago against Elvin Kostka for damages alleged to have been sustained to plaintiff's automobile in a collision between the automobiles of plaintiff and defendant at the intersection of Mannheim and Joliet roads in Cook County. A statement of claim was filed by plaintiff and an affidavit of merits by defendant. The cause was submitted to a jury which returned a verdict for plaintiff upon which the judgment was entered from which this appeal is taken. It is suggested in the record that the defendant in this case, prior to the filing of the suit herein, had brought suit against the plaintiff here for damages arising out of the same accident, and that the two cases were tried together. The record contains no pleadings in the latter case, nor anything else to indicate that such a suit is pending, or that it pending, they were tried and submitted to the jury as one case, except a statement to that effect in the bill of exceptions, so that we will here consider only the case of Supp v. Kostka, the instant case.

Mannheim road runs north and south and crosses Joliet road, which runs in a northeasterly and southwesterly direction at approximately right angles. At about 3 o'clock on the morning of July 7th, 1929, plaintiff Supp was driving his automobile on the Joliet road, and defendant Kostka was driving south on Mannheim road.

Elmer A. Tuel was produced as a witness for plaintiff Supp.

He testified in substance that on the evening in question, he was a gas station operator at a gas station on the corner of Joliet and Mannheim Roads, and that he recalled a collision which happened there at about 9:30 o'clock P. M. He stated that he was standing outside of the gas station facing northwest; that there were present with him at the time, Dick May, Robert Wolf and Leonard Dieke; that he, the witness, noticed a car coming down Mannheim Road rather fast, and that the driver failed to stop at the sign before coming to the Joliet Road; that he, the witness, also saw a car coming from the west at 25 miles an hour, and that as this car was about to cross the intersection, the car coming from the north rather fast and at a speed of from 40 to 50 miles an hour, and which car had failed to stop at the stop sign, hit the car coming from the west, at the front. It appears that this witness had a claim against the insurance company in which defendant was insured, and on cross-examination, this witness was asked whether or not he had said to Mr. Beach of this insurance company, that at the time of the accident in question on the evening of July 22nd, 1932, "I (the witness) was telephoning and did not see an accident. I do not know any witnesses," to which the witness answered, "Not that I remember." He was asked if he was in the office of the Bankers Indemnity Insurance Company, the company in question, on October 5th, 1932, and his answer was "No, I was not." Further, the witness was asked if he had not said to a Mr. DeShields, an agent of this insurance company, at that time, "If you will settle the case that I have with you, if you will give me $200, my friend Wolf and I will testify for you," to which Sass answered, "I did not." Sass admitted that he did have a case pending against this insurance company.

Hoyt B. DeShields, a witness for defendant Kostka, testified that he was in charge of the Indemnity Department of the Bankers Indemnity Insurance Company, and superintendent of claims; that on October 5th, 1932, he had a conversation with Sass, who he identified

He testified in substance that on the evening in question, he was a gas station operator at a gas station on the corner of Joliet and Kennedy roads, and that he recalled a collision which happened there at about 8:30 o'clock p. m. He stated that he was standing outside of the gas station facing northwest; that there were present with him at the time, Dick Ory, Robert Hirt and Leonard Lee; that he, the witness, noticed a car coming down Kennedy road either fast, and that the driver failed to stop at the sign before coming to the Joliet road; that he, the witness, also saw a car coming from the west at 35 miles an hour, and that he ran out to cross the intersection, the car coming from the north traveling fast and at a speed of from 40 to 50 miles an hour, the driver of which car had failed to stop at the stop sign, hit the car coming from the west, at the front. It appears that this witness had a claim against the insurance company in which defendant was insured, and on cross-examination, this witness was asked whether or not he had said to Mr. Reed of the insurance company, that at the time of the accident in question on the evening of July 22nd, 1922, "I (the witness) was telephoning and I did not see an accident. I do not know any witness," to which the witness answered, "not that I remember." He was asked if he was in the office of the Eastern Casualty Insurance Company, the company in question, on October 5th, 1922, and his answer was "No, I was not." Further, the witness was asked if he did not sign a [illegible] statement of this insurance company, at that time, "If you will [illegible] the case that I have with you, if you will [illegible] my [illegible] I will testify for you," to which he answered, "I [illegible]." He admitted that he did have a case against [illegible] insurance company.

Mr. Dobbins, a witness for defendant herein, testified that he was in charge of the indemnity department of the Eastern Indemnity Insurance Company, and [illegible] at [illegible] on October 5th, 1922, he had a conversation with Hirt, who he stated had

as a witness sitting in the courtroom, and that the conversation took place in the office of the insurance company. He said that Sass told him there that he, Sass, was "in there (meaning the office of the company) making a claim on account of an accident that he was involved in, *** and that he was making a claim against our company, *** and that his case was one of liability on the part of our company.****" He went on to say that he had witnessed another accident that we were interested in, and that if we would settle his claim, he would testify in our behalf, and furthermore, he had two friends whose names he gave me, and whose names I have here, one, Robert Wolf of Hinsdale, and Leonard Dieke of Western Springs, who he said he would also produce as witnesses in our favor if we would pay his claim, which, if I remember correctly, he wanted $300 for." I said, "In the event we do not pay your claim, what are going to do?" "Well," he said, "I am going to testify favorable to the other side." Then I asked him again, "In the event we settle your claim and give you $200, then you will testify for us, favorable to us?" He said, "Yes." I said, "If we do not pay it to you, then you are going to testify for the other side, favorable to them," and he said, "Yes."

Sass was recalled and denied that he had ever been in the office of the Bankers Indemnity Insurance Company, or that he had talked to De Shields. After the case had been submitted to the jury, and while the jury was out considering the verdict, the court called this witness Sass before him and told Sass that he had lied when he testified that he had seen this accident, and Sass admitted that this was so. Of course, the jury had no knowledge of this admission. In order to bring out the facts in connection with the Sass testimony, the defendant was compelled to bring to the attention of the court and jury the fact that he was insured and necessarily this was to his disadvantage, and we are of the opinion that in view of all the circumstances the state of the record is such that the defendant should have a new trial. The cause is, therefore, reversed and remanded.

WILSON AND HEBEL, JJ. CONCUR. REVERSED AND REMANDED.

as a witness sitting in the courtroom, and that the conversation took place in the office of the insurance company. He said that Ann told him there that he, Ann, was "in there (meaning the office of the company) making a claim on account of an accident that he was involved in." Ann that he was making a claim against our company, ""and that his case was one of liability on the part of our company."" He went on to say that he had witnessed another accident that we were interested in, and that if we would settle his claim, he would testify in our behalf, and furthermore, he had two friends whose names he gave me, and whose names I have here, one, Robert "Bob" of Hinsdale, and Leonard Dike of Western Springs, who he said he would also produce as witnesses in our behalf if we would pay his claim, which, if I remember correctly, he asked $50 for." I said, "In the event we do not pay your claim, what are going to do?" "Well," he said, "I am going to testify favorable to the other side." Then I asked him again, "In the event we settle your claim and give you $50, then you will testify for us, favorable to us?" He said, "Yes." I said, "If we do not pay it to you, then you are going to testify for the other side, favorable to them," and he said, "Yes."

Then was presented the question that he had ever been in the office of the Western Casualty Insurance Company, or that he had talked to Ann Smiths. After the case had been submitted to the jury, and while the jury was out considering the verdict, the court called this witness back before him and told him that he was under oath, and testified that he had seen this accident, and was interested in this case, of course, the jury had no knowledge of this matter. In order to bring out the facts in connection with the conversation, the defendant was compelled to bring in the testimony of the plaintiff and jury the fact that he was interested and necessarily lied in his advantage, and we are of the opinion that it is plain error to permit witnesses the state of the record in such that the defendant should have a new trial. The judgment, therefore, reversed and remanded.

Mr. Justice Dove, Mr. Justice Carter, concurring.

36745

PEOPLE OF THE STATE OF ILLINOIS, ex rel JOHN MORONEY, Appellee,	APPEAL FROM
v.	SUPERIOR COURT
JAMES P. ALLMAN, et al., Appellants.	COOK COUNTY.

275 I.A. 628

Opinion filed May 2, 1934

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the respondents from an order entered by the court directing the respondents by a writ of mandamus to issue a license to the relator, John Moroney, to operate a certain place of amusement located at 8301 South Chicago Avenue, in the City of Chicago.

On February 27, 1933, a petition was filed for a writ of mandamus by the relator against the City of Chicago and certain of its officers, praying that the respondents issue to the relator a license to operate a public place of amusement at the place above stated.

The respondents answered, and the cause was tried by the court without a jury, and after the evidence was heard by the court, on motion, leave was granted to the relator to file an amended petition praying for a renewal of his 1932 license, and that the answer of the respondents stand as an answer to the amended petition. Thereafter the court entered a judgment whereby the respondents were enjoined from molesting the relator in and about the management and conduct of said business, and that a peremptory writ of mandamus issue commanding the respondents to issue a renewal of the license, as prayed for in the amended petition.

Thereafter the relator as complainant filed his verified bill of complaint in the Superior Court of Cook County, Illinois, against the City of Chicago and the therein named officers of the City, and prayed that an injunction issue upon the facts therein charged, and an injunction was issued as prayed for, and upon an

PEOPLE OF THE STATE OF ILLINOIS,
ex rel JOHN MORONEY,

appellee,

v.

JAMES M. SLOSSER, et al.,

appellants.

Opinion filed May 2, 1934

MR. JUSTICE ELDER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the respondents from an order entered by the court directing the respondents by a writ of mandamus to issue a license to the relator, John Moroney, to operate a certain place of amusement located at 6001 South Halsted Avenue, in the city of Chicago.

On February 27, 1933, a petition was filed for a writ of mandamus by the relator against the city of Chicago and certain of its officers, praying that the respondents issue to the relator a license to operate a public place of amusement at the place above stated.

The respondents demurred, and the cause was tried by the court without a jury, and after the evidence was heard by the court, on motion, leave was granted to the relator to file an amended petition praying for a renewal of his 1932 license, on the ground that the answer of the respondents stated no answer to the amended petition. Thereafter the court entered a judgment ordering the respondents were enjoined from molesting the relator in and about the management and conduct of said business, and that a peremptory writ of mandamus issue commanding the respondents to issue a renewal of the license, as prayed for in the amended petition.

Thereafter the relator on commencing filed his verified bill of complaint in the superior court of Cook County, against the city of Chicago and the various named officers of the city, and prayed that an injunction issue upon the facts therein charged, and an injunction was issued as prayed for, and upon an

interlocutory appeal this court in case No. 36915 affirmed an order enjoining the defendants named from molesting, annoying or interfering with the complainant in the operation of his business in the City of Chicago until the termination of the mandamus proceeding in the instant case.

The theory of the relator is that he had a license, issued by the City of Chicago, which expired at the end of the year 1932, and that he applied on January 3, 1933, for a renewal of the license and on January 12, 1933, deposited $250 as payment for a renewal of the license for the year 1933; that he had leased the premises described, and had invested large sums of money in the enterprise; that although he had complied with all requirements of the law, the respondents arbitrarily refused to renew thelicense as applied for.

The answer of the respondents to the relator's theory is that the relator procured a license to operate the place of business as an individual but permitted it to be unlawfully operated as a partnership, of which he was a member; that he permitted slot machines to be kept on the premises; that his firm operated the place after January 1, 1933, without a license; that the firm, although it was not to be dissolved until January 31, 1933, made no application for a license, but operated the place illegally until January 30, 1933.

A mandamus proceeding is an action at law, and the rule is established that in such a proceeding the court has no equitable jurisdiction. The question at issue in this case is: Shall the writ of mandamus issue or be denied upon the record as made? In Clingen, et al. v. Harrison, et al, 195 Ill. App. 301, an analogous case, the court held that an injunction will not be granted in a mandamus proceeding, and said:

> "That part of the order said to be erroneous is encompassed within the following words: 'And to give full effect and force to the process and mandamus of this court, you and your agents, servants and employees and agents, servants and employees of the City of Chicago, and the successor in office to you, are hereby restrained and commanded to refrain from interference

interlocutory appeal this court in case no. 20815 affirmed an order enjoining the defendants named from molesting, annoying or interfering with the complainant in the operation of his business in the city of Chicago until the termination of the mandamus proceeding in the instant case.

The theory of the relator is that he had a license, issued by the City of Chicago, which expired at the end of the year 1932, and that he applied on January 3, 1933, for a renewal of the license and on January 12, 1933, requested the payment for a renewal of the license for the year 1933; that he had leased the premises described, and had invested large sums of money in the enterprise; that although he had complied with all requirements of the law, the respondents arbitrarily refused to renew the license applied for.

The answer of the respondents to the relator's theory is that the relator procured a license to operate the place of business as an individual but permitted it to be illegally operated by a partnership, of which he was a member; that he permitted slot machines to be kept on the premises; that his firm operated the place after January 1, 1933, without a license; that the firm, although it was not to be dissolved until January 31, 1933, made no application for a license, but operated the place illegally until January 31, 1933.

A mandamus proceeding is an action at law, and the rule is established that in such a proceeding the court has no equitable jurisdiction. The question of issue in this case is: Shall the writ of mandamus issue or be denied when the relator is a member in illegal, [illegible] v. Carlisle, et al., 140 Ill. App. 401. In [illegible] case, the court held that an injunction will not be granted in a mandamus proceeding, and said:

"That part of the order said to be erroneous is contained within the following words: 'and be also that without the force to the process and mandamus in this court, you, the said respondents, servants and employees and agents, severally and collectively of the City of Chicago, and the successor in office to you, are hereby restrained and commanded to refrain from interference

in the exhibition of the films aforesaid until the further order of this court.'

The part of the so-called mandamus order recited above is in its essence and purport injunctional. It is the rule in this and other jurisdictions, where the distinction between law and equity jurisdiction obtains, that mandamus and injunction cannot be granted in the same order or in the same cause. These actions are separate and distinct both in their essence and operation."

In the instant case the court should not have included as a part of the order of mandamus, an order enjoining the respondents from molesting the relator in his management of the place of business at 8301 South Chicago Avenue.

The respondents introduced evidence that a police officer found two slot machines used for gambling purposes in the place of business of the relator in December, 1932, which evidence was stricken from the record by the court. Evidence was introduced by respondents tending to show that persons were employed as agent for the relator who had criminal records. This also was stricken.

In granting a license provided for by an ordinance of a municipality, the mayor may take into consideration the reputation of the applicant and the applicant's operation of the business, the character of the persons employed having criminal records, and the use of gambling devices, and from all the facts and circumstances surrounding the operation of the business determine whether an application for a renewal of the license should be granted. We believe that the evidence stricken from the record, that slot machines used for gambling were found in the premises, and the evidence as to the character of persons having criminal records who congregated in the place of and were employed by the relator, was material and should have been considered by the court in order to determine whether the mayor abused a discretion vested in him in the refusal to renew the license applied for by the relator.

in the exhibition of the films referred until the further order of this court.'

The part of the so-called mandamus order remained here is in its essence and support injunctional. It is the rule in this and other jurisdictions, where the distinction between law and equity jurisdiction obtains, that mandamus and injunction cannot be granted in the same order or in the same cause. Those actions are separate and distinct both in their essence and operation."

In the instant case the court should not have included as a part of the order of mandamus, an order enjoining the respondents from molesting the relator in his management of the place of business at 8201 South Halsey avenue.

The respondents introduced evidence that a police officer found two slot machines used for gambling purposes in the place of business of the relator in December, 1937. Such evidence was stricken from the record by the court. Evidence was introduced by respondents tending to show that certain men employed in place for the relator who had criminal records. This was not material.

In granting a license provided for by an ordinance of a municipality, the mayor may, if he has reasonable ground to believe the applicant and the applicant's operation of the business, the character of the persons employed having criminal records, and the use of gambling devices, and from all the facts and circumstances surrounding the operation of the business, determine whether in granting the license the interest of the licensee should be granted. It follows that the evidence taken from the record, that slot machines used for gambling were found in the premises, and the evidence as to the character of persons having criminal records who were employed in the place of business employed by the relator, was sufficient to be considered by the court in order to determine whether the license should be granted. The court abused a discretion vested in him in the ordinance in order the license applied for by the relator.

While it was not proper for the trial court to enter a restraining order, still in view of this court's opinion, heretofore mentioned, affirming upon an interlocutory appeal an order entered in an equity proceeding restraining the same officials from interfering with the relator's business pending disposition of this case, we will not deem it necessary to consider this question upon this appeal.

For the reasons indicated in this opinion, the judgment entered in this case is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HALL, P.J. AND WILSON, J. CONCUR.

While it was not proper for the trial court to enter a restraining order, still in view of this court's opinion, heretofore mentioned, affirming upon an interlocutory appeal an order entered in an equity proceeding restraining the same officials from interfering with the relator's business pending disposition of this case, we will not deem it necessary to consider this question upon this appeal.

For the reasons indicated in this opinion, the judgment entered in this case is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Hall, J.J. and Gilson, J. concur.

36774

A. W. NOYES,

(Complainant) Appellee,

v.

ANTON J. ROEMER,
Defendant.

Interlocutory Appeal of Anton J. Roemer, Jacob Schug and Marie Schug,
(Defendants) Appellants.

INTERLOCUTORY APPEAL
FROM THE
CIRCUIT COURT
COOK COUNTY.

11-34

275 I.A. 628

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal by Anton J. Roemer, Jacob Schug and Marie Schug, from an order appointing a receiver upon the application of the complainant, based upon his bill of complaint filed to foreclose a trust deed on the premises known as 1824 West Jackson Blvd., Chicago, Illinois, securing the payment of a principal note for the sum of $6500, and interest coupons. No appearance was filed upon this appeal by the complainant, and therefore we are not advised as to the position of the complainant upon the questions involved.

The bill of complaint charges the execution and delivery by Anton J. Roemer, a bachelor, of one principal promissory note for $6500, dated September 6, 1929, and due 5 years after date, with interest at 6 per cent per annum, evidenced by 10 interest coupon notes.

The payment of the principal note and interest coupons is secured by a trust deed conveying the described premises to the Chicago Title and Trust Company, as trustee.

The bill further charges that the premises are located at 1824 West Jackson Blvd., Chicago, Illinois, and are improved with a 2-story and basement brick building, and a small frame building in the rear of the property. It is further charged that the premises

L. S. BOYKE,

(Complainant) Appellee,

v.

ANTON J. ROSMER,

Defendant.

Interlocutory appeal of Anton J. Rosmer, Jacob Young and Marie Jahns,

(Defendants) Appellants.

MR. JUSTICE BRETT DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal by Anton J. Rosmer, Jacob Young and Marie Jahns, from an order appointing a receiver upon the application of the complainant, based upon his bill of complaint filed to foreclose a trust deed on the premises known as 1884 West Jackson Blvd., Chicago, Illinois, securing the payment of a principal note for the sum of $6500, and interest coupons. No appearance was filed upon this appeal by the complainant, and the cause was ordered to the position of the complainant upon the questions involved.

The bill of complaint charges the execution and delivery by Anton J. Rosmer, a grantor, of the principal promissory note for $6500, dated September 6, 1926, and due 3 years after date, with interest at 8 per cent per annum, evidence of indebtedness and coupon notes.

The payment of the principal note and interest coupons is secured by a trust deed conveying the described premises to the Chicago Title and Trust Company, as trustee.

The bill further charges that the premises are located at 1884 West Jackson Blvd., Chicago, Illinois, and are improved with a 2-story and basement brick building, and a small frame building in the rear of the property. It is further charged that the premises

are in bad condition and in need of repairs, and that the value of the improvements does not exceed $6,000.

The order appointing the receiver was entered by the court on the 25th day of March, 1933. The order was entered prior to the service of summons on the named defendants in the cause, except as to the Chicago Title & Trust Company. A notice was attempted to be served upon the defendants for the appointment of a receiver, which notice was in the following form:

"State of Illinois
County of Cook - ss.
In the Circuit Court of Cook County.

A. W. Noyes
vs.
Anton J. Roemer, et al.

NOTICE

You are hereby notified that on Friday, the 17th day of March, A. D. 1933, at the opening of Court or as soon thereafter as Counsel can be heard, I shall appear before his Honor Judge William V. Brothers in the room usually occupied by him as a Court Room in the County Building, City of Chicago, or before such other Judge as may be sitting in his stead, and ask for the appointment of receiver in the above entitled cause and shall use the Bill of Foreclosure filed herein, in support of said motion, at which time and place you may appear if you see fit.

Dated Chicago, Illinois, March 15, 1933.

Ralph R. Obenchain."

That an attempt was made to serve notice upon the defendants for the appointment of a receiver appears from the affidavit, which is as follows:

"State of Illinois
County of Cook - ss

Ruth Cohen being first duly sworn on oath, deposes and says that she is employed by Ralph R. Obenchain, Solicitor for the Complainant, that she deposited in the United State Post Office at Clark & Dearborn Streets, Chicago, Illinois, envelopes properly addressed to each of the following defendants: Anton J. Roemer, Jacob Schug, sometimes known as Jacob Schugg, and Marie Schug or Schrug, his wife, Neil McGrath, Jack Chitzian, R. J. Radzwill, Elizabeth Ells, and A. H. Stewart, containing a true copy of the within notice this 15th day of March, A. D. 1933, before the hour of seven o'clock, postage prepaid."

The named receiver qualified by filing a bond in the penal sum of $1,000, as required by the order of appointment. Service of notice on the defendants of an application for the appointment of a

are in bad condition due in part of repairs, and that the value of the improvements does not exceed $2,000.

The order appointing the receiver was entered by the court on the 28th day of April, 1927. The order was entered prior to the service of summons on the named defendants in the suit, except as to the John Doe Title & Trust Company. A notice was attempted to be served upon the defendants for the appointment of a receiver, which notice was in the following form:

"State of Illinois
County of Cook - ss.
In the Circuit Court of said County.

A. F. Boyes
vs.
Anton J. Cermak, et al.

NOTICE

You are hereby notified that on Friday, the 15th day of March, A. D. 1927, at the opening of Court or as soon thereafter as Counsel can be heard, I shall appear before the Honor Judge William V. Brothers in the room usually occupied by him as a Court Room in the County Building, City of Chicago, or before such other Judge as may be sitting in his stead, and ask for the appointment of a receiver in the above entitled cause (of which was the bill of foreclosure filed herein, in accord with notice, at which time and place you may appear if you see fit.

Dated Chicago, Illinois, March 10, 1927.

[illegible]
Attorney.

[illegible]

for the [illegible] of [illegible], in [illegible], on is as follows:

"State of Illinois
County of Cook - ss

[illegible] Court being duly sworn on oath, [illegible] that she is employed by [illegible] Company, [illegible] the complainant, that she [illegible] the [illegible] Title & Trust Company [illegible], [illegible] examined recently [illegible] of the County [illegible] Illinois, [illegible] Anton J. Cermak, [illegible] Jacob Sabath, and Marie Cermak or Sabath, [illegible] Illinois, [illegible] Chicago, [illegible] the [illegible] Illinois, [illegible] since 11th day of March, A. D. 1927, [illegible] o'clock, noontime [illegible].

The named receiver qualified by [illegible] in the sum of $1,000, as required by the [illegible] Statutes of [illegible] notice on the [illegible] [illegible]

receiver for the premises, was by mail. The notice is insufficient and does not comply with the rules of court. Roemer, the holder of the equity of redemption did not appear in response to the notice, and no reason is shown why an attempt was made to serve the notice by mail. Grabowski v. MacLaskey, 257 Ill. App. 484; Hai v. American Bottle Co., 261 Ill. 362; Davis v. Blair, 252 Ill. App. 417.

Want of proper service of notice upon the defendant Roemer and other defendants is sufficient to warrant a reversal of the order entered by the court appointing a receiver, and therefore it is not necessary to pass upon the other questions called to our attention.

The order is reversed.

ORDER REVERSED.

HALL, P.J. AND WILSON, J. CONCUR.

trespasser for the premises, was by mail. The notice is insufficient and does not comply with the rules of court. Moreover, the relator of the equity of redemption did not appear in res cause to the motion, and no reason is shown why an attempt was made to serve the notice by mail. Kuykendall v. McCleskey, 127 Ill. App. 498; Ball v. American Notice Co., 201 Ill. 386; Davis v. Dixie, 204 Ill. App. 417.

Want of proper service of notice upon the delinquent owner and other defendants is sufficient to warrant reversal of the order entered by the court appointing a receiver, and therefore it is not necessary to pass upon the other questions called to our attention.

The order is reversed.

ORDER REVERSED.

MCR, P.J., and WILSON, J., concur.

36814

PEOPLE OF THE STATE OF ILLINOIS, ex rel OSCAR NELSON, as Auditor of Public Accounts of the State of Illinois,

v.

WEST TOWN STATE BANK, a corporation, On Appeal of OTTO H. BERZ,

Appellant.

THOMAS B. ROBERTS, Receiver,

Respondent - Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

275 I.A. 629

Opinion filed May 2, 1934

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the intervening petitioner, Otto H. Berz, from a decree entered in the Circuit Court of Cook County on March 21, 1933, dismissing his petition for want of equity. The petitioner filed in the proceedings instituted by the People to dissolve the West Town State Bank a petition which sought to set off against his obligation of $31,695.81 to the West Town State Bank, a claim against the bank in the amount of $39,700, and certain accrued interest, based upon an agreement by the bank to repurchase from the petitioner, at a discount of one per cent, real estate mortgage bonds in the principal amount of $30,000, sold to the petitioner in the year 1927, at the time of making the repurchase agreement. Upon answer thereto by the receiver of the West Town Bank, the cause was referred by the court for hearing to a Master in Chancery, who thereafter filed his report, to which report the petitioner filed his exceptions, and upon consideration of the Master's Report and the exceptions filed by the petitioner, the exceptions were overruled and the petition dismissed for want of equity.

The question before this court is whether the bank, by its agreement to repurchase at a discount the mortgage bonds sold by it to the petitioner, entered into a valid and enforceablecontract,

38814

PEOPLE OF THE STATE OF ILLINOIS, ex rel OSCIA ZELDON, as Auditor of Public Accounts of the State of Illinois,

v.

WEST TOWN STATE BANK, a corporation, On Appeal of OTTO G. [illegible],

Appellant.

Appellee.

Appeal from

Illinois Court

Cook County.

THOMAS D. [illegible], Receiver,

Respondent - Appellee.

2 Ill. App. 629

Opinion filed May 2, 1934

MR. JUSTICE [illegible] delivered the opinion of the court.

This is an appeal by the intervening petitioner, Otto G. [illegible], from a decree entered in the Circuit Court of Cook County on March 23, 1933, dismissing his petition for want of equity. The petitioner filed in the proceedings instituted by the people to dissolve the West Town State Bank a petition which sought to set off against his obligation of $31,888.31 to the West Town State Bank, a claim against the bank in the amount of $19,000, and special interest, based upon an agreement by the bank to [illegible] from the petitioner, at a discount of one per cent, [illegible] bonds in the principal amount of $20,000, sold to the petitioner in the year 1927, at the time of making the [illegible]. Upon answer thereto by the receiver of the West Town [illegible], the cause was referred by the court for hearing to a master in chancery, who thereafter filed his report, to which [illegible] the petitioner filed exceptions, and upon consideration of the master's report and the exceptions filed by the petitioner, the exceptions were overruled and the petition dismissed for want of equity.

The question before this court is whether the [illegible], by its agreement to repurchase at a discount the [illegible] bonds sold by it to the petitioner, entered into a valid and enforceable contract.

and was such contract within the scope of the bank in doing a general banking business?

The precise question was considered by the Supreme Court in the case of Knass v. The Madison and Kedzie State Bank, 354 Ill. 554, and the court held in that case that an agreement by a bank to repurchase at a specific price mortgage bonds sold by it is not within the scope of a general banking business, and the guaranteeing of such bonds is not within any of the powers conferred on banks by the Banking Act, nor a necessary incident to the powers granted, and that such an agreement is void as against public policy and in violation of the statute for the protection of depositors, in that such agreement may jeopardize or impair deposits or trust funds of the bank, resulting in injury to depositors, and that such a contract cannot be enforced. The court also passed upon the question of laches by a bank, which is one of the questions raised here on appeal, and held that the bank is not estopped to set up the invalidity of its agreement to repurchase bonds. The opinion of the court is conclusive upon the question before this court, and the Chancellor did not err in refusing to grant the relief prayed for by the petitioner and properly dismissed the petition for want of equity. The decree is accordingly affirmed.

DECREE AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.

and was such contract within the scope of the bank in doing a general banking business?

The precise question was considered by the Supreme Court in the case of Adams v. The Madison and Indiana State Bank, 2nd Ill. 254, and the court held in that case that an agreement by a bank to repurchase at a specific price mortgage bonds sold by it is not within the scope of a general banking business, and the mere writing of such bonds is not within any of the powers conferred on banks by the Banking Act, nor a necessary incident to the powers granted, and that such an agreement is void as against public policy and in violation of the statute for the protection of depositors, in that such agreement may jeopardize or impair deposits by trust funds of the bank, resulting in injury to depositors, and that such a contract cannot be enforced. The court also passed upon the question of loans by a bank, which is one of the questions raised here on appeal, and held that the bank is not estopped to set up the invalidity of its agreement to repurchase bonds. The opinion of the court is conclusive upon the question before this court, and the Chancellor did not err in refusing to grant the relief prayed for by the complainant, and properly dismissed the petition for want of equity. The decree is accordingly affirmed.

Decree affirmed.

Mr. J. J. and Mr. J. C.

36823

IN THE MATTER OF THE ESTATE OF THOMAS CRUTCHER, Deceased, JOHN CRUTCHER,

Appellant,

v.

STRAUS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, Administrator of the Estate of Thomas Crutcher, Deceased,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

275 I.A. 629

Opinion filed May 2, 1934

MR. JUSTICE MERRL DELIVERED THE OPINION OF THE COURT.

John Crutcher, an heir at law of Thomas E. Crutcher, deceased, appeals from a judgment order entered by the court without a jury, on April 4, 1933, in the Circuit Court of Cook County, Illinois, denying the objections filed by Crutcher and other of the heirs at law to the approval of the final account of the administrator and the table of heirship entered in the Probate Court of Cook County.

The question is from what final order entered in the Probate Court did the petitioner perfect his appeal. On December 4, 1931, an order was entered in the Probate Court overruling the objections to the final account of the administrator, from which an appeal was allowed upon the filing of a bond of $250 within 20 days, to be approved by the court. On the 24th day of December, 1931, an appeal bond was filed and approved, and from the condition of the bond it appears that John Crutcher appeals from an order overruling the objections of the heirs of law to the approval of the administrator's final account in the Estate of Thomas E. Crutcher, deceased. Thereafter a supplemental transcript was filed in the Circuit Court, from which it appears that on December 24, 1931, an order was entered nunc pro tunc as of December 4, 1931, which recites the vacation of the order of December 4, 1931, and on said December 24, 1931, an order was entered in the Probate Court, which stood in lieu of the order of December 4; that the objections of John Crutcher, and others, to

IN THE MATTER OF THE ESTATE OF THOMAS
CRUTCHER, Deceased, JOHN CRUTCHER,

Appellant,

v.

STATE NATIONAL BANK AND TRUST COMPANY
OF CHICAGO, Administrator of the Estate
of Thomas Crutcher, Deceased,

Appellee.

Appeal from
Cook County.

Opinion filed May 2, 1934

MR. JUSTICE BARNES delivered the opinion of the court.

John Crutcher, an heir at law of Thomas A. Crutcher, deceased, appeals from a judgment order entered by the court without a jury, on April 4, 1933, in the Circuit Court of Cook County, Illinois, denying the objections filed by appellant and other of the heirs at law to the approval of the final account of the administrator and the table of heirship entered in the Probate Court of Cook County.

The question is from what final order entered in the Probate Court did the petitioner perfect his appeal. On December 4, 1931, an order was entered in the Probate Court overruling the objections to the final account of the administrator, from which an appeal was allowed upon the filing of a bond of $200 within 30 days, to be approved by the court. On the 7th day of December, 1931, an appeal bond was filed and approved, and from the condition of the bond it appears that John Crutcher appeals from an order overruling the objections of the heirs of law to the approval of the administrator's final account in the estate of Thomas A. Crutcher, deceased. Thereafter a supplemental transcript was filed in the Circuit Court, from which it appears that on December 14, 1931, an order was entered nunc pro tunc as of December 4, 1931, which recites the validity of the order of December 4, 1931, and on 14th December, 1931, an order was entered in the Probate Court, which stood in lieu of the order of December 4; that the objections of John Crutcher, and others, to

the proof and table of heirship be and the same is overruled.

It appears that the filing of the supplemental transcript of the Probate Court was somewhat irregular in that no order was entered granting leave to file, still the trial court considered the evidence offered by the respective parties upon the questions involved, and entered the judgment order now before this court on appeal.

The question considered by the court was one largely of fact, and the court determined from the evidence that Louise Crutcher was the widow of Thomas E. Crutcher, deceased. It appears from the evidence that the widow, Louise Crutcher, was formerly the wife of one Willie E. Fryerson; that Willie E. Fryerson lived in San Francisco, California, and shortly prior to the earthquake of 1906, wrote to his wife Louise Crutcher, but from the date of the earthquake he was not heard from, although search was made for him through the Police Department in San Francisco, and in other ways. After ten years from the date of the earthquake, on July 19, 1916, Louise Crutcher married Thomas E. Crutcher and lived with him as his wife until he died in 1919. There is some evidence that Willie E. Fryerson was seen on two occasions, and that Mrs. Crutcher was seen speaking to him.

The court was evidently impressed by the fact that from the lapse of time since Fryerson was last seen alive, the evidence of Fryerson's existence was not fairly established, and of course the trial court took into consideration the credibility of the witnesses and the weight of the evidence. As the conclusion of the court does not appear to be against the manifest weight of the evidence this court is not disposed to disturb the order overruling the objections filed to the table of heirship, as entered, and the approval of the final account of the administrator of the Estate of Thomas Crutcher, deceased. The Supreme Court in the case of Johnson v. Johnson, 114 Ill. 611, in quoting from the case of Kelly v. Drew, 12 Allen, 107 upon a somewhat analogous case, pertinently stated:

the proof and table of heirship, be and the same is reversed.

It appears that the filing of the supplemental transcript of the Probate Court was somewhat irregular in that no order was entered granting leave to file, still the trial court considered the evidence offered by the respective parties upon the questions involved, and entered the judgment under review before this court on appeal.

The question considered by the court was one largely of fact, and the court determined from the evidence that Louisa Gustener was the widow of Thomas A. Gustener, deceased. It appears from the evidence that the widow, Louisa Gustener, was formerly the wife of one Willie E. Ryerson; that Willie E. Ryerson lived in San Francisco, California, and shortly prior to the earthquake of 1906, moved to his wife Louisa Gustener, but from the date of the earthquake he was not heard from, although search was made for him through the Police Department in San Francisco, and in other ways. Later ten years from the date of the earthquake, on July 1, 1916, Louisa Gustener married Thomas A. Gustener and lived with him as his wife until he died in 1919. There is some evidence that Willie E. Ryerson was seen on two occasions, and that Mr. Gustener was seen speaking to him.

The court was evidently impressed by the fact that from the lapse of time since Ryerson was last seen alive, the evidence of Ryerson's existence was not highly satisfactory. [illegible] the trial court took into consideration the credibility of the witnesses and the weight of the evidence. In the consideration of the court does not [illegible] to [illegible] the weight of the evidence this court is not bound to disturb the order overruling the objections filed to the [illegible] order [illegible] approval of the final account of the administrator of the estate of Thomas Gustener, deceased. The [illegible] cited in the case of Johnson v. Johnson, 112 Ill. 211, in quoting from the [illegible] v. [illegible], 17 Allen, 107 upon a somewhat analogous case, [illegible] stated:

"'Under the circumstances the presumption of the wife's innocence in marrying again might well overcome any presumption that a man, not heard from for four years before the marriage, or for sixteen years afterward, was alive, and her lawful husband, when she married the second time.' At the trial of this cause over sixteen years had elapsed since the last knowledge of the former husband, and we see no reason why these principles do not apply. We think the complainant might safely rely upon the presumption of the validity of her marriage. The law did not impose on her, under the circumstances of this case, the duty of preserving the evidence of the dissolution of her former marriage, and producing it on the trial, but the burden was on the defendant to prove such facts and circumstances as would establish the invalidity of his marriage with complainant."

The objections of the petitioner to the table of heirship entered in the Probate Court of Cook County were not sustained by the evidence offered by him, and therefore the trial court properly overruled the objections, leaving the order of heirship as established in the Probate Court in full force and effect. This also applies to the approval of the final account. The court properly entered an order that the objections were not sustained by the evidence, and the court is not required, nor would it be proper, to enter a judgment upon the record as it appears before this court. Reynolds v. The People, 55 Ill. 328. This proceeding was for the purpose of settling the question of heirship and the statement of final account. If the facts did not warrant, all that the trial court could do was to deny the objections filed in these matters. Gagney, et al. Exrs. v. O'Brien, et al. 83 Ill. 72.

Objection to the admissibility of evidence, as well as to the offering of proper evidence, has been called to our attention. We have examined the questions before this court in this connection, and are satisfied that there is no error such as would justify a reversal upon these grounds. The judgment order is affirmed.

JUDGMENT ORDER AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.

"Under the circumstances the presumption of the trial's innocence in marrying again might well overcome any presumption that a man, not heard from for four years before the marriage, or for sixteen years after, was alive, and her lawful husband, when she married the second time. If the trial of this cause over sixteen years had elapsed since the last knowledge of the former husband, we see no reason why these prima facie do not apply. We think the complainant might a fortiori rely on the presumption of the validity of her marriage. The law did not impose on her, under the circumstances of this case, the duty of overcoming the evidence of the dissolution of her former marriage, and proceeding at on the trial, and the question was on the defendant to prove such fact and circumstances as would establish the invalidity of his marriage with complainant."

The objections of the petitioner to the rule of evidence applied in the Probate Court of Cook County were not sustained by the evidence offered by him, and therefore the trial court properly overruled the objections, leaving the order of heirship in established in the Probate Court in full force and effect. This also applies to the recovery of the trial court. The court properly entered an order that the objections were not sustained by the evidence, and the court is not prejudiced, nor would it be proper, to enter a judgment upon the record as it appears before this court. Reynolds v. The People, 91 Ill. 339. This proceeding was for the purpose of settling the question of heirship, and the statement of final account. If the facts did not warrant, or that the trial court could do was to deny the objections filed in those matters. Conroy et al. Exrs. v. Mahon, et al. 91 Ill. 9.

Objection to the admissibility of evidence, we will go to the offering of proper evidence, we have called to our attention. We have examined the matters below, and find in our consideration, and is satisfied that there is no error such as would justify a reversal upon these grounds. The judgment order is affirmed.

Judgment affirmed.

Hall, P.J. and Gibson, J. concur.

37001

OLIVER A. BESTEL,

Complainant, Appellant,

v.

H. H. BRIGHAM, et al.,

Defendants,

MEAD F. RUSSELL and MAY E. H. RUSSELL, his wife,

Appellees.

APPEAL FROM THE

SUPERIOR COURT OF

COOK COUNTY.

275 I.A. 629[3]

Opinion filed May 2, 1934

MR. JUSTICE MEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant from an order entered in the Superior Court of Cook County on June 3, 1933, in a foreclosure proceeding modifying the deficiency decree by reducing the amount found to be due from $2,932.28 to $300. On February 17, 1933, a decree of foreclosure was entered by the court after overruling the exceptions of the defendants to the master's report, and from the decree it appears that Mead F. Russell and May E. H. Russell executed their promissory notes aggregating the sum of $8,000, bearing interest at the rate of 6% per annum and payable to bearer; that to secure the payment of the indebtedness the defendants conveyed the real estate described in the trust deed; that the payment of the principal, interest and taxes was in default, and that there was due to the complainant under the terms of the trust deed the sum of $10,066.33; that thereafter the premises were sold to Oliver A. Bestel for $7500, which sale was reported by the master; that the proceeds were not sufficient to satisfy the decree of indebtedness in full; and that there was a deficiency of $2,932.28 still due and owing to the complainant.

On April 4, 1933, no objections having been filed to the report of sale and distribution, the master's report was approved and the court entered a deficiency decree for $2,932.28. On May 25, 1933, the defendant, Mead F. Russell, filed a petition praying that the

77001

OLIVER A. BEGLA,

Complainant, Appellant,

v.

H. H. BIGLAND, et al.,

Defendants,

MEAD F. MORRELL and MAY E. H. MORRELL, his wife,

Appellees.

Opinion filed May 2, 1934

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant from an order entered in the superior court of Los Angeles County on June [illegible], in a foreclosure proceeding, modifying the deficiency decree by reducing the amount found to be due from $[illegible] to $[illegible]. On February 17, 1926, a decree of foreclosure was entered by the court after overruling the exceptions of the defendants to the master's report, at from the decree it appears that Mead F. Morrell and May E. H. Morrell executed their promissory notes aggregating the sum of $[illegible], bearing interest [illegible] of 8% per annum and payable to order; that to secure the payment of the indebtedness the defendants executed [illegible] mortgage in the trust deed; that [illegible] in default, interest had accrued in default, and that [illegible] the terms of the trust deed [illegible] the premises were sold to [illegible] reported by the master; that the proceeds were not sufficient to satisfy the decree of foreclosure; and that there was a deficiency of $[illegible] with [illegible].

On April 4, [illegible], no objections [illegible] filed to the report of sale and distribution, the master's report was approved, and the court entered a deficiency decree for $[illegible]. On [illegible], the defendants, Mead F. Morrell, filed a petition [illegible] the

amount of the deficiency be reduced to a reasonable sum, and as a ground for such relief the petitioner stated in substance that upon a hearing the amount of the deficiency was suggested by the complainant; that the court objected to the amount of the deficiency decree, due to the fact that the property was a small residence and the amount involved did not justify the amount of the deficiency, and that the petitioner understood upon that hearing that the deficiency had been reduced, and he was not advised to the contrary until May 13, 1933, when he was notified to appear in court on the petition of James B. Kaine, the receiver, relative to the payment of rent, and because of such misunderstanding the petitioner had failed to present his petition at an earlier date.

On May 29, 1933, complainant filed his general and special demurrer to the petition of the defendant, and on June 3, 1933, the court overruled the demurrer of the complainant, and the complainant having elected to stand by his demurrer, the court entered the order here on appeal by the complainant.

The defendant, Mead F. Russell, on this appeal failed to file an appearance and we are not advised as to his theory in support of the order entered by the court. From the facts set forth in the petition filed by the defendant, it does not appear that the defendant charged fraudulent conduct in the sale of the property, nor that the amount of the sale was so inadequate as to amount to an evidence of fraud. The deficiency decree signed by the chancellor is for the amount reported by the master in chancery, to whom the cause was referred. It is not even charged that the property was sold for an inadequate price, except the statement in the petition that the court objected to the amount of the deficiency. The fact is, however, that the court did sign the decree for the amount of

amount of the deficiency be reduced to a reasonable sum, and as a ground for such relief the petitioner stated in substance that upon a hearing the amount of the deficiency was suggested by the complainant; that the court objected to the amount of the deficiency decree, due to the fact that the property was a small residence and the amount involved did not justify the amount of the deficiency, and that the petitioner understood upon this hearing that the deficiency had been reduced, and he was not summoned to the courtroom until May 12, 1921, when he was notified to appear in court on the petition of James E. Laine, the complainant, relative to the payment of rent, and because of such misunderstanding, the petitioner had failed to present his petition at an earlier date.

On May 28, 1921, complainant filed his general and special demurrer to the petition of the defendant, and on June 1, 1921, the court overruled the demurrer of the complainant, and the complainant having elected to stand by his demurrer, the court entered the order here on appeal by the complainant.

The defendant, prior to trial, in this appeal failed to file an appearance and we are not called on to file a brief in support of the order entered by the court. Upon the facts set forth in the petition filed by the defendant, we have not found that the defendant charged fraudulent conduct in the sale of the property, nor that the amount of the sale was so inadequate as to amount to an evidence of fraud. The deficiency decree signed by the chancellor in for the amount reported by the master in chancery, to whom the cause was referred. It is not even contended that the property sold for an inadequate price, except the amount of the deficiency that the court objected to the amount of the deficiency. The fact is, however, that the court did sign the decree for the amount of

the deficiency and approved the report of sale and distribution filed by the master in chancery in the proceeding.

In the case of Bondurant v. Bondurant, 251 Ill. 324, the court in passing upon a question similar in nature to the one before us, said:

> "The policy of the law, founded on the interest of owners and purchasers alike, is that there should be stability in judicial sales, in order that property may bring its full value. Mere inadequacy of price will not justify a court in refusing to approve a sale and depriving the purchaser of the benefit of his purchase unless the inadequacy is so great as to amount to evidence of fraud. (Kiebel v. Leick, 216 Ill. 474; Barling v. Peters, 134 id. 606.) If the objection to a sale is that the property sold for less than it was worth and a re-sale is asked for to secure more money, the parties objecting to the confirmation should bring the money into court or make a binding advance bid or guaranty against loss on the re-sale. (Quigley v. Breckenridge, 180 Ill. 627). If there is illegality or irregularity sufficient to avoid a sale the court will refuse approval, and if there are irregularities, although slight, coupled with an insufficient price, the sale will be set aside." Citing cases.

We are of the opinion that the facts stated in the petition of the defendant are not sufficient to justify the order of the court modifying the decree by reducing the amount of the deficiency.

The point is raised that the deficiency decree was entered at a former term and the court was without jurisdiction in entering the modifying order at a subsequent term. However, having passed upon the merits of the controversy and reached the conclusion that the court erred in entering the order, we do not deem it necessary to consider this question. The order is reversed and the cause remanded with directions to the court to enter such other and further orders consistent with the views expressed in this opinion.

REVERSED AND REMANDED, WITH DIRECTIONS.

HALL, P. J. AND WILSON, J. CONCUR.

the deficiency and approved the report of [illegible] and distribution filed by the master in chancery in the [illegible] dispute.

In the case of Bondurant v. Bondurant, 101 Ill. 334, the court in passing upon a question similar in nature to the one before us, said:

> "The policy of the law, to rule on the interest of owners and purchasers alike, is that there should be stability in judicial sales, in order that property may bring its full value. Mere inadequacy of price will not justify a court in refusing to approve a sale and depriving the purchaser of the benefit of his purchase unless the inadequacy is so great as to amount to evidence of fraud. (Kimball v. Lake, 218 Ill. 474; Martin v. Pettus, 144 Ia. 308.) If the objection to a sale is that the property sold for less than it was worth and a re-sale is asked for to secure more money, the proper objection to the confirmation should bring the money into court or else [illegible] any lien or right or property against less or the re-sale. (Murphy v. Brookbridge, 180 Ill. 287). If there is liability or frequently sufficient to avoid a sale to the [illegible] refuse a [illegible], and if there are frequent sales, although slight, coupled with an insufficient price, the sale will be set aside." Citing cases.

[illegible] of the opinion that the [illegible] petition of the defendant was not sufficient to justify the order of the court modifying the decree by reducing the amount of the deficiency.

The point is [illegible] the [illegible] [illegible] a former term and the court has a final jurisdiction in entering the modifying order [illegible]. However, [illegible] upon the merits of the controversy [illegible] the contention that the court erred in entering the order, [illegible] to consider the question. The order is reversed [illegible] remanded with directions to the court to [illegible] further orders consistent with the views expressed in this opinion.

Reversed [illegible].

Hall, P. J., and [illegible], J., concur.

37287

MARION G. WILSON, Executrix of the Estate of William Garnett, Deceased,

Defendant in Error,

v.

RAYMOND E. PROCHNOW,

Plaintiff in Error.

WRIT OF ERROR TO

CIRCUIT COURT

COOK COUNTY.

275 I.A. 629

Opinion filed May 2, 1934

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause was before the Supreme Court of Illinois upon a writ of error, which court transferred the cause to this court for the reason that in order to warrant a direct appeal to the Supreme Court the validity, and not merely the construction, of a statute must be involved. Wilson v. Prochnow, 354 Ill. 98.

The defendant Raymond E. Prochnow was committed to the County Jail of Cook County by virtue of certain orders entered by the Circuit Court of Cook County in a proceeding there tried upon appeal from an order entered in the Probate Court of Cook County, which proceeding was originally instituted under secs. 81 and 82 of Chap. 3 of an act entitled, "Administration of Estates". (Cahill's Ill. Rev. Stats. 1933). Sec. 81 is in part as follows:

> "If any executor or administrator, or other person interested in any estate, shall state * * * that he believes that any person has in his possession, or control, or has concealed, converted, or embezzled any goods, chattels, moneys or effects, books of accounts, papers or any evidences of debt whatever, or titles to lands belonging to any deceased person or the executor or administrator, or the estate of any deceased person * * * the court shall require such person to appear before it by citation and may examine him on oath * * * and make such order in the premises as the case may require." "

Sec. 82 provides for the commitment of a person and the enforcement of judgment recovered against a person under the act for failure to pay, and is substantially as follows:

> "If such person * * * refuses to deliver up such property or effects, or in case the same has been converted, the proceeds or value thereof, upon a requisition being made for that purpose by an order of the said court, such court may commit such person to jail until he shall comply with the order of the court therein. * * * "

The executrix of the Estate of William Garnett, deceased, filed a

Opinion filed May 2, 1934

Mr. JUSTICE [illegible] delivered the opinion of the court:

This cause was before the [illegible] upon a writ of error, which court transferred the cause to this court for the reason that it cannot to a direct appeal to the supreme Court the validity, and not merely the [illegible], of a statute must be involved. Wilson v. Freeman, 334 Ill. 39.

The defendant [illegible] A. Freeman was committed to the County Jail of Cook County by reason of [illegible] by the Criminal Court of Cook County in a proceeding that trial upon appeal from an order entered in the Probate Court of Cook County, which proceeding was originally instituted [illegible] entitled, "Administration of estates." (Smith's [illegible] 1933), sec. 83 is in part as follows:

> "If any executor or administrator, [illegible] shall be [illegible] in any matter, [illegible] that any [illegible] in the [illegible], or [illegible], or [illegible], [illegible], or [illegible], [illegible] or affects, books of account, [illegible] debt whatever, or [illegible] person or the execution of [illegible] [illegible] to [illegible] [illegible] and [illegible] such order in [illegible]."

Sec. 83 provides for the commitment [illegible] of judgment recovered [illegible] for failure to [illegible] may, and is [illegible] as follows:

> "If such [illegible] or affect, or [illegible] proceed, or [illegible] for that [illegible] any [illegible] to [illegible] the order of the court therein."

The executrix of the [illegible] of [illegible], [illegible]

statement under oath, as provided by sec. 81, and thereupon a citation was issued, and the defendant Raymond E. Prochnow responded and was examined in the Probate Court, and again in the Circuit Court of Cook County. Certain findings of fact appear in the order entered by the court in the cause.

On March 30, 1933, Prochnow, upon motion, obtained leave to file his verified petition in the nature of a writ of error coram nobis, setting up the condition of the record in the instant case, and requesting that the commitment order entered without jurisdiction confining the defendant in the County Jail be vacated, and that the prayer of the petition be granted. To this petition the attorney for the estate presented to the court his counter affidavit, and upon the face of the pleading, the motion of the defendant was denied.

From the petition it appears that the petitioner had been confined in the County Jail for more than six months, pursuant to the order of the Circuit Court entered in a supplemental decree. It also appears from the petition that Raymond E. Prochnow appeared in court, and as a witness was questioned regarding certain exhibits; that the petitioner was not present when the decree was entered by the court on May 24, 1932, and had no knowledge that the decree had been entered until after the time had expired in which to file a certificate of evidence; that his attorney endeavored to obtain a transcript of the evidence, but was refused the same by the court reporter who appeared in court and reported the proceedings by her shorthand notes; that he was also refused a transcript by the attorney of the estate, who informed petitioner's attorney that the shorthand notes were destroyed by his order, and that the attorney for the estate did not have a copy thereof in his possession.

It is also stated in the petition that Raymond E. Prochnow was in the County Jail and received no notice of the move to obtain a

statement under oath, as provided by sec. 1, and thereupon a citation was issued, and the defendant, Raymond E. Cobbow, responded and was examined in the probate court, and, in the circuit court of Cook County. Certain findings of fact appear in the order entered by the court in the cause.

On March 20, 1917, Cobbow, upon notice, obtained leave to file his verified petition in the nature of a writ of error coram nobis, setting up the condition of the record in the instant case, and requesting that the commitment order entered without jurisdiction confining the defendant in the county jail be vacated, and that the prayer of the petition be granted. On this petition the attorney for the estate presented to the municipal court of Chicago, and upon the time of the hearing, the petition was denied.

From the petition it appears that the petitioner had been confined in the county jail for more than six months, pursuant to the order of the circuit court entered in a proceeding de lunatico. It also appears from the petition that Raymond E. Cobbow appeared in court, and no a attorney was questioned concerning certain activities; that the petitioner was not present when the decree was entered by the court on May 24, 1916, and that he knew that the decree had been entered until after the time had expired in which to file a certificate of evidence; that his attorney endeavored to obtain a transcript of the evidence, but was refused the time by the court reporter; the proceeds in court had reported the proceedings; that he was also refused a transcript of the proceedings, and informed petitioner's attorney that the court had not been interested by his order, and that the attorney had not set it [illegible] a copy thereof in his possession.

It is also stated in the petition that Raymond E. Cobbow was in the county jail and received no notice of the hearing

supplemental decree; that if given an opportunity to be heard, he would have presented a meritorious defense. It is also stated in the petition that at the time of the filing of said petition and at the time of the proceedings, and at all times since, he had no property or income, and was the owner merely of the clothes upon his back and a few personal belongings not exceeding $25.00 in value, and that his wife and children were dependent upon relatives and charity for support.

It also appears from the petition that there were several accounts appearing in the decree entered in this cause, which for convenience are designated by the attorney for the petitioner as, "Trading Account," "Holmes Deal," and "Collateral Account."

It appears from the petition that the finding of the Court as to what is designated "Trading Account", is in part as follows: That in the year 1918 said Raymond E. Prochnow, the petitioner, was a salesman for the investment firm of E. Raumberg & Company; that in August, 1925, Raymond E. Prochnow acquired the interest of Knud O. Borregaard, and in October, 1925, he acquired the interest of Louis E. Borregaard; that on January 1, 1926, he changed the name to R. E. Prochnow & Company, Inc., that Prochnow owned all of the common stock, except a few qualifying shares held by his brother; that he also owned all the preferred stock, except 57 shares which he sold to William Garnett; that R. E. Prochnow & Company, Inc., is and always has been the personal corporation of said Raymond E. Prochnow, and except for said 57 shares of preferred stock sold to William Garnett, is strictly a "family affair;" that all of the transactions were conducted by said petitioner in his own behalf and were in fact his personal transactions; that said Raymond E. Prochnow was a dealer in bonds and, as such, transacted business with and for the decedent, William Garnett, continously from the year 1921 to the date of his death on July 13, 1930, at the age of 74 years; and

employment, I decree; that it gives an opportunity to [illegible], he would have remained a [illegible] laborer. It is also stated in the petition that at the time of the filing of said petition and at the time of the proceedings, and at all times since, he had no property or income, and was the owner merely of the clothes upon his back and a few personal belongings not amounting [illegible] in value, and that his wife and children were dependent upon relatives and charity for support.

It also appears from the petition that there were several accounts appearing in the decree entered in this cause, which for convenience are designated by the attorney for the petitioner as, "Trading account," "Holmes Seal," and "Indiana account."

It appears from the petition that the finding of the court as to what is designated "Trading account", is in part as follows: that in the year 1919 said upwards of "Jackson", the petitioner, was a salesman for the Investment firm of [illegible] & Company; that in August, 1922, upwards of [illegible] for interest of [illegible] Sorenson, and in October, 1922, he received the interest of [illegible] E. Jorgenson; that on January 1, 1923, he obtained the name of [illegible] Jackson & Company, Inc., [illegible] company owned all of the common stock, except a few qualifying shares held by his brother; that he also owned all the preferred stock, covering, by shares which he said to William Jarrett; that [illegible] Company, Inc., is not always has been the personal corporation of said [illegible] Jackson, and except for said 37 shares of preferred stock held by William Jarrett, is entirely a "family affair"; that all of the transactions were conducted by said petitioner in his own behalf and are in fact his personal transactions; that said upwards [illegible] bonds and, in such, transacted business with said [illegible] William Jarrett, continuously from the year 1921 to the [illegible] of his death on July 14, 1925, at the age of 24 years; and

5 That Raymond E. Prochnow reported by letter to the decedent, William Garnett, in his lifetime, that they held for him in safekeeping $3,000 Washington Coast Utilities Company 8 per cent bonds, $2,000 Yadkin River Power Company 6 per cent bonds, and $3,000 Market Street Railway Company 7 per cent bonds; that on April 23, 1924, a so-called "trading account " was established, by agreement, whereby the above $5,000 of bonds and $5,000 of other bonds were delivered to said petitioner by said decedent to be placed in a $10,000 "trading account" for said William Garnett; that the bonds in said so-called "trading account" totaled the sum of $9,767.30; that the terms of this agreement were that the above $10,000 of bonds would be placed by petitioner in a "trading account" for the decedent, Willaim Garnett; that these or equivalent bonds would be returned to him and that, in the meantime, said Garnett would receive from the petitioner a check for $60 each month on the 23d day of the month, commencing on May 23, 1924, until December 23, 1924, and that it was agreed by Raymond E. Prochnow that "the above bonds, or any others traded therefor are held in a separate package marked with William Garnett's name"; and thereafter said "trading account" was extended six months and the petitioner wrote to William Garnett that -

> "In accordance with our conversation, the plan is hereby extended for six months, until June 23, 1925, and will be in full force until that date, when we will turn over to you $10,000 par value of bonds; in the meantime, you will receive on the 23d day of each month, a check for income in the amount of $60, as heretofore."

That instead of holding said bonds in a separate package marked with William Garnett's name, petitioner testified that immediately after these $10,000 bonds were received they were mixed with their own inventory of bonds on hand, although accountants employed by claimant could find no record whatever of this "trading account" on the books of petitioner's company.

That witness E. [illegible] reported by letter to the president, William Garrett, in his [illegible], that they had for the [illegible] in keeping $5,000 a Washington Gas utility company 6 per cent bonds, $5,000 Yadkin River Power Company 6 per cent bonds, and $[illegible] street Railway Company 7 per cent bonds; that on April [illegible], 1[illegible], a so-called "trading account" was established, by agreement, thereby the above $5,000 of bonds and $5,000 of other bonds were delivered to said petitioner by said decedent to be placed in a $10,000 "trading account" for said William Garrett; that the bonds in said so-called "trading account" totaled the sum of $[illegible]; that the terms of this agreement were that the above $10,000 of bonds would be placed by petitioner in a "trading account" for the decedent, William Garrett; that these or equivalent bonds would be returned to his [illegible], in the meantime, said Garrett would receive from the petitioner a check for [illegible] each month on the 3d day of the month, commencing on May [illegible], 1924, until December [illegible], 1924, at [illegible] per cent [illegible] "the above bonds, or any other bonds [illegible] in a separate package marked with William Garrett's name"; and there after said "trading account" was extended six months and [illegible] William Garrett that -

> "In accordance with our conversation, this is to say extended for six months, until June [illegible], and will be in full force until that date. Then we will turn over to you $10,000 par value of bonds; in the meantime, you will receive on the 3rd day of each month, a check for $[illegible] in the amount of $80, as heretofore."

That instead of holding said bonds in a separate package marked with William Garrett's name, petitioner testified that immediately after these $10,000 bonds were received they were mixed with their own inventory of bonds on hand, although accountants employed by plaintiff could find no record whatever of the "trading account" on the books of petitioner's company.

It also appears from the decree referred to in the petition of Raymond E. Prochnow that Raymond E. Prochnow testified that William Garnett gave him a note for $8500, dated March 8, 1924, which was offered in evidence in the Circuit Court, and that on June 23, 1930, William Garnett wrote petitioner a letter that -

> "We agree between us that the so-called 'Trading Account' which pays $60 per month shall cease today - this also cancels my note for $8500 held by you."

The court in said decree further found that the alleged letter was a false, fraudulent and forged document, and that the signature purporting to be the handwriting and signature of William Garnett was not his signature, and that the document was a fraudulent and forged instrument. It also appears from the finding that Prochnow testified that on April 25, 1924, the day after he received the $10,000 of bonds to place in said "trading account," he sold them on the open market, and obtained therefor $9,955.00, and that Prochnow converted the proceeds to his own use.

With reference to what has been designated the "Holmes Deal" it appears from the decree that the petitioner Raymond E. Prochnow, proposed to William Garnett, that each of them should furnish $6,000 par value of bonds on a so-called "special deal"; that Prochnow would then borrow $10,000 to give to an unnamed New York Stock market operator, whose name was not made known to Garnett, to be used by the petitioner for "organization purposes", to buy 31 shares of stock from said New York stock operator, Prochnow to have one-half and Garnett to have one-half, and that Prochnow and Garnett were to receive out of this New York stock market operator's earnings, a sum equal to the amount they had advanced, and, in addition, as a bonus an interest in this company for five years, this bonus to be roughly in the nature of 1,000 shares of stock in this New York operator's company, when he formed it.

It also appears from the finding of the court in the decree

It also appears from the decree referred to in the petition of Raymond E. Freeman that Raymond E. Freeman testified that William Burnett gave him a note for $8000, dated March 8, 1924, which was offered in evidence in the circuit court, and that on June 27, 1920, William Burnett wrote petitioner a letter that -

> "We agree between us that the so-called 'trading account' which has for month small losses today - this also denotes my note for $8000 held by you."

The court in said decree further found that the alleged letter was a false, fraudulent and forged document, and that the signature purporting to be the handwriting and signature of William Burnett was not his signature, and that the document was a fraudulent and forged instrument. It also appears from the finding that Freeman testified that on April 30, 1924, the day after he received the $10,000 of bonds to place in said "trading account," he sold them on the open market, and obtained therefor $9,894.50, and that Freeman converted the proceeds to his own use.

With reference to what has been designated the "Holmes deal" it appears from the decree that the petitioner, Everett J. Freeman, proposed to William Burnett, that each of them should contribute $5,000 par value of bonds on the so-called "Holmes deal"; that Freeman would then borrow $10,000 to give to an unknown New York stock operator whose name was not made known to Everett, to be used by the stockbroker for "organization purposes", to buy 2[illegible] shares of stock from a New York stock operator, Freeman to have one-half and Everett to have one-half, and that Freeman and Everett were to realize out of this New York stock market operator's earnings, a sum equal to the amount they had advanced, and, in addition, to a bonus on interest in this company for five years, this bonus to be realized in the profits of 1,000 shares of stock in this New York operator's company, when he formed it.

It also appears from the finding of the court in the decree

that as William Garnett's part of the transaction, he should and, on September 3, 1929, did furnish to Raymond E. Prochnow certain bonds, of the par value of $6,000, specially selected by Raymond E. Prochnow, because there was "the least likelihood of any of these bonds being called, having a very high call price or in some cases being uncallable."

It also appears that not until after Garnett's death did Prochnow allege that this stock market operator's name was Holmes, either J. H. or J. K. he did not know which; that Prochnow did not in fact furnish any bonds or cash of his own in this deal; that on September 3, 1929, the day Prochnow obtained delivery of said bonds from Garnett, Prochnow borrowed the net sum of $4,889.86 from the Continental Illinois Bank and Trust Company, of Chicago, on his personal collateral note for 90 days, and deposited said $6,000 par value of William Garnett's bonds as collateral security therefor.

It also appears that Raymond E. Prochnow caused said bonds to be sold and the proceeds converted to his own personal use, and no accounting has ever been made to Garnett or his estate; that said bonds and the proceeds thereof remained the property of Garnett and are now the property of his estate.

It appears from the finding in what is designated as "Collateral Account" that Prochnow converted bonds of the value of $1,857.93, and that the total conversion value and accrued interest amounts to $2,082.11.

The name of the bonds and the dates of maturity are specifically described in the finding of the court. It further app appears from the decree and is called to the attention of the court by the petition of Prochnow, that he obtained possession, but not title or ownership, from said William Garnett of $16,000, par value, of miscellaneous other bonds which he previously sold to said Garnett, and which have never been returned or accounted for to said Garnett or his estate, and that the total price of the bonds

that he William Kennett's part of the transaction, he should say, on September 3, 1929, did furnish to Krooboow certain bonds, of the par value of $,000, specifically referred to by Krooboow, because as there was "the least likelihood of any of these bonds being called, having a very high call price or in some cases being uncollable."

It also appears that not until after Kennett's death did Krooboow allege that this stock market operator's name was Jones, either J. S. or J. E. He did not know author; that Krooboow did not in fact furnish any bonds or cash if his own in this deal; that on September 3, 1929, the by Krooboow obtained delivery of said bonds from Kennett, Krooboow borrowed the net sum of $,865.00 from the Continental Illinois Bank and Trust Company, of Chicago, on its personal collateral note for 90 days, and in united said $,[illegible] per value of William Kennett's bonds as collateral security therefor.

It also appears that Krooboow owned said bonds to be void. At the crossed converted in [illegible], on no accounting has ever been made by [illegible] of said bonds and the crossed tracer remained the property of Kennett and are now the property of his estate.

It appears from the finding in that is highlight "Collateral account" that Krooboow received bonds of the value of $1,837.00, and that the total commission value [illegible] amounts to $7,080.11.

The name of the bonds [illegible] specifically in order in the [illegible] of the bonds. It further appears from the decree and is [illegible] by the petition of Krooboow, that to obtain [illegible] title or ownership, from said William Kennett of [illegible] of misrepresentations other bonds which he [illegible] said to [illegible] Kennett, and which have never been [illegible] said property or his estate, and that the total price of the bonds

enumerated in the decree is $11,862.00, and from the evidence it appears that Prochnow sold the bonds and the proceeds were used for his personal advantage, and that he did not account to Garnett for the bonds or the money received therefor.

It further appears from the decree referred to by the petitioner that the judgment order of the court upon which the decree is based, is in words and figures as follows:

> "It is further ordered, adjudged and decreed, that said petitioner, Marion G. Wilson, do have and recover from said respondent, Raymond E. Prochnow, the sum of thirty thousand two hundred and eighty-two dollars and sixty-one cents ($30,282.61), hereinabove found to be due and owing from said respondent to said petitioner and said estate; also that said petitioner do have and recover from said respondent said two thousand dollars ($3,000), par value, of General Vending Corporation 10 yr. Sec. Sinking Fund 6% Bonds due August 16, 1937, with August 15, 1930, and all subsequent interest coupons attached thereto, or in lieu thereof, the Receipts of Voting Trust Certificates issued therefore, if any there are, duly assigned to said petitioner; also said three thousand dollars ($3,000), par value, of National Theatres Corporation First and Refunding Mortgage "A" 6½ bonds, comprising bonds Nos. 1576, 1579 and 1580, with June 1, 1930, and all subsequent interest coupons attached thereto, or in lieu thereof, the Depositary Certificate issued therefor, if any there is, duly assigned to petitioner; said sum and said securities being the aggregate of property or the proceeds or value of property belonging to said decedent. William Garnett, and to the estate of said decedent, which said respondent has in his possession, or control, or which he has concealed, converted, or embezzled, and also the costs of this suit or proceeding, and that said petitioner, Marion G. Wilson, Executrix of the Estate of William Garnett, deceased, have execution for said money judgment as upon a judgment at common law against the real and personal property of said respondent Raymond E. Prochnow, as by statute in such case made and provided."

Thereafter, on June 18, 1932, a supplemental decree was entered, from which decretal order it appears that Marion G. Wilson, Executrix of the Estate of William Garnett, deceased was to recover from Raymond E. Prochnow the amount converted and due and owing from Prochnow to the said estate.

There also appears as part of the decretal order the following:

> "It is Further Ordered, Adjudged and Decreed, that said respondent, Raymond E. Prochnow, be and he hereby is ordered and required to pay over and deliver unto said petitioner, Marion G. Wilson, Executrix of the Estate of William Garnett, deceased, or to Thomas G. Vent, Esq., her counsel, said sum

commenced in the decree is $11,382.00, and from the evidence it appears that Yeomans sold the bonds and the proceeds were used for his personal advantage, and that he did not account to Barnett for the bonds or the money received therefor.

It further appears from the decree referred to by the petitioner that the judgment order of the court upon which the decree is based, is in words and figures as follows:

"It is further ordered, adjudged and decreed, that said petitioner, Wilson G. Allen, do have and recover from said respondent, Raymond A. Yeomans, the sum of twenty thousand two hundred and eighty-two dollars and sixty-one cents ($20,282.61), heretofore found to be due and owing from said respondent to said petitioner, as said matter; also that said petitioner do have and recover from said respondent, the sum of two thousand dollars ($2,000), or so much thereof as remains unpaid, on account of the decree due August 16, 1937, with August 16, 1939, and all subsequent interest accruing thereon, or in lieu thereof, the appellee or trust certificates issued therefor, if any there are, duly assigned to said petitioner; also said three thousand dollars ($3,000), per value, of Federal Farmers Corporation first and extension coupon bonds of bonds, commencing bonds dated 1928, 1929 and 1930, with June 1, 1939, and all subsequent interest coupons attached thereto, or in lieu thereof, the appellee or trust certificates issued therefor, if any there be, duly assigned to petitioner; said sum and said securities being the aggregate of property or the proceeds or value of property belonging to said decedent, William Barnett, and to the estate of said decedent, which said respondent has in his possession, or control, or which he has converted, converted, or embezzled, and the costs of this suit as proceeding, and that said petitioner, Wilson G. Allen, recover of the estate of William Barnett, deceased, the said sum for execution for said money judgment is upon a judgment of said common law against the real and personal property of said respondent, Raymond A. Yeomans, as by statute in such case made and provided."

Thereafter, on June 16, 1939, [illegible] from which decretal order [illegible] Wilson G. Allen, executors of the estate of William Barnett, deceased, [illegible] to the said estate.

There also appears as part of the decree [illegible] the following:

"It is further ordered, adjudged and decreed, that said respondent, Raymond A. Yeomans, be and he hereby is ordered and required to pay over and deliver unto said petitioner, Wilson G. Allen, executor of the last to of William Barnett, deceased, or to Thomas A. Hunt, Esq., his counsel, [illegible]

of thirty thousand two hundred and eighty-two dollars and sixty-one cents ($30,282.61); said two thousand dollars ($2,000.00), par value of General Vending Corporation 10 Yr. Sec. Sinking Fund 6% bonds due August 16, 1937, with August 15, 1930, and all subsequent interest coupons attached thereto, or in lieu thereof, the Receipts or Voting Trust Certificates issued therefor, if any there are, duly assigned to said petitioner; and said three thousand dollars ($3,000.00), par value, of National Theatres Corporation First and Refunding Mortgage "A" 6½% bonds, comprising bonds Nos. 1576, 1579 and 1580, with June 1, 1930, and all subsequent interest coupons attached thereto, or in lieu thereof, the Depositary Certificate issued therefor, if any there is, duly assigned to petitioner, all within twenty (20) days from and after the day and date hereof, or that, in default thereof, said respondent, Raymond E. Prochnow, be committed to the County Jail in and for said County of Cook and State of Illinois, until he shall comply with said order and decree of this court; and jurisdiction of this cause and proceeding hereby expressly reserved so that this order and decree may be made effective.

From the entry of this decree said respondent hereby prays an appeal to the Supreme Court of the State of Illinois, which appeal is hereby allowed, upon an appeal bond with good and sufficient surety in the penal sum of forty-five thousand dollars ($45,000.00), being approved by this court and filed herein within twenty (20) days from and after the date hereof, and a certificate of evidence to be signed and sealed by the court and filed herein within sixty (60) days from and after the date hereof.

And the court having read said petition and being fully advised in the premises doth find that, although more than twenty (20) days have elapsed since the entry of said final decree, said respondent, Raymond E. Prochnow, has failed to make the payments and to deliver the securities required of him in said decree, and has failed to comply with the above and foregoing provisions of said decree, either in whole or in part; that he has not presented or filed an appeal bond for the approval of this court wherewith to perfect an appeal from said final decree to the Supreme Court of the State of Illinois, as provided for in said decree; and that said decree, order and judgment has, therefore, become final and absolute as against said respondent."

And finally it was ordered by the court that a body attachment or capias be forthwith issued to attach the body of Raymond E. Prochnow; that a mittimus issue, and that he be committed to and confined in the County Jail until he shall comply with the order of the court.

The petitioner contends that from the decree it is apparent that the relationship which existed between Prochnow, or his Company, and Garnett was that of a creditor and debtor, and therefore the

of thirty thousand two hundred and twenty-two dollars and sixty-one cents ($30,222.61); said two thousand dollars ($2,000.00), per value of mortgage vending conversion 19 Yr. "ee. Binding Fund of bonds due January 12, 1977, with August 14, 1950, and all accrued interest coupons attached thereto, or in lieu thereof, the vendors or holding trust certificates issued therefor, if any there are, duly executed to said notificator; and said three thousand dollars ($3,000.00), per value, of bailment, conversion appraisal first and mumbling certificate "ff" bonds, possibility bonds due. 1976, 1979 and 1980, with June 1, 1950, and all subsequent interest coupons attached thereto, or in lieu thereof, the depositary certificate issued therefor, if any there is, duly assigned to petitioner, one within twenty (20) days from and after the day and date hereof, or that, in default thereof, said respondent, Armond A. Toodoes, be committed to the county jail in and for said county of Cook and state of Illinois, until or until compliance with said order and decree of this court; and punishment of this cause and proceeding hereby express ly reserved, so that this order and decree may be made effective.

From the entry of this decree and judgment, hereby prays an appeal to the Supreme Court of the state of Illinois, which appeal is hereby allowed, upon an appeal bond with good and sufficient surety in the penal sum of forty-five thousand dollars ($45,000.00), being approved by this court and filed herein within twenty (20) days from and after the date hereof, and a certificate of evidence to be filed and sealed by the court and filed herein within sixty (60) days from and after the date hereof.

And the court having in a fair edition and being fully advised in the premises doth find that, although more than twenty (20) days have elapsed since the entry of said final decree, said respondent, Armond A. Toodoes, has failed to make payments and to deliver the [illegible] mortgaged in said decree, and has failed to comply with the [illegible] provisions of said decree, either in whole or in part; that he has not presented or filed a proposal bond for the approval of this court wherein he requests an appeal from said final decree to the Supreme Court of the state of Illinois, as provided for in said decree; and that [illegible] and judgment has, therefore, become [illegible] and [illegible].

And finally it was ordered by the court [illegible] that [illegible] ment or [illegible] be terminated [illegible] [illegible] of appeal. Provided; that a sufficient [illegible] and that [illegible] contained in the county jail until [illegible] by with the order of the court.

The petitioner contends that the record [illegible] that the relationship [illegible] between Toodoes, or his [illegible] and Garnett was that of a creditor and debtor. [illegible]

court was not within its jurisdiction to enter the decree and in support of this contention cites the case of Johnson v. Nelson, 341 Ill. 119, wherein the court in its opinion said:

> "The power to determine questions of title and rights of property and to enforce by execution orders adjudicating titles or requiring the delivery of property, added to sections 81 and 82 by the amendatory act, does not include jurisdiction of the ordinary action for the recovery of money the title to which is in the debtor. Where the relation of debtor and creditor arises for money lent, the debtor owns the money and is indebted to the creditor for it, and consequently the debtor has no money belonging to the creditor, or to the latter's estate, in his possession. To enforce collection of the indebtedness in such case, by the rendition of a personal judgment against the debtor, was not within the scope of sections 81 and 82 prior to July 1, 1925, and no such power was conferred by the amendatory act, either expressly or by implication."

However, it is important to consider further what was said by the Supreme Court in its opinion as to the recovery by the executor or administrator of such estate of specific property of a deceased person, its proceeds or value, that has been converted. The court said:

> "The amendments to section 81 enlarged its provisions to include property belonging to 'the executor or administrator or the estate of any deceased person' and conferred upon the court the power to determine, upon a trial by jury if demanded by either party, questions of title and rights of property. Notwithstanding these additions, the purpose of the section as amended, apart from the recovery of books of account, papers or instruments of title, and the obtaining of information, is to recover possession of specific property, or if converted its proceeds or value. Section 81, as now in effect, contemplates that the testate or intestate, at the time of his death, held or at least claimed, and that the executor of his will or the administrator of his estate, since his death, either in succession or initially, holds or claims, the title to the property of which possession is sought."

The findings of fact complained of by the petitioner come clearly within the statute in question. Throughout the final decree entered in the proceeding by the Circuit Court of Cook County, the petitioner was charged with possession of the stocks and bonds enumerated in the findings of fact as being the property of William Garnett, deceased, and that without the consent of Garnett in his lifetime Frochnow converted the stocks and bonds by transfer or

court was not within its jurisdiction to enter the decree, and in support of this contention cites the case of Jackson v. Ketcham, 74 Ill. 111, wherein the court in its opinion said:

> "The power to determine questions of title and rights of property and to enforce by execution orders adjudicating title or requiring the delivery of property, added to questions 21 and 22 by the constitution, does not include jurisdiction of the ordinary action for the recovery of money the title to which is in the debtor. Where the relation of debtor and creditor arises for money lent, the debtor owns the money and is indebted to the creditor for it, and consequently the debtor has no money belonging to the creditor, or to the debtor's estate, in his possession. To enforce collection of the indebtedness in such case, by the rendition of a personal judgment against the debtor, was not within the scope of sections 21 and 22 prior to July 1, 1872, and no such power was conferred by the constitution, either expressly or by implication."

However, it is important to consider further what was held by the Supreme Court in its opinion as to the recovery by the executor or administrator of such estate of specific property of a deceased person, its proceeds or value, that has been converted. The court said:

> "The amendments to section 21 enlarged its provisions to include property belonging to the executor or administrator of the estate of any deceased person, and conferred upon the court the power to determine, upon a trial by jury if demanded by either party, questions of title and rights of property. Notwithstanding these additions, the purpose of the section as amended, remains the recovery of money or of property, rights or interests in title, and the ascertaining of indebtedness, in to recover possession of specific property, or if converted its proceeds or value. Section 21, as now in effect, contemplates that the testator or intestate, at the time of his death, was or at some other time, and that the executor of his will or the administrator of the estate, since his death, either in possession or rightfully, claim or claim, the title to a property of which conversion is sought."

The findings of fact contained in the petitioner's case closely within the statute in question. Accordingly the final order entered in the proceeding by the Circuit Court of Cook County, the petitioner was charged with conversion of the stocks and summarized in the findings of fact as being the property of William Donnell, conveyed, and yet without the consent of Donnell in his lifetime Trombom converted the stocks and bonds by transfer or

sale, and the funds so derived, to his own use, and the action in the Probate Court, as well as in the Circuit Court, is well within the act to recover personal property owned by Garnett, or its converted value by the petitioner in this form of action.

This court has examined the questions called to the attention of the court, and are of the opinion that the proceeding before us is but an effort by Proehnow to have reviewed the findings of fact of the trial court. If a review was desired it should have been taken by appeal, or upon a writ of error to the court having jurisdiction of the cause. Chapman v. North American Ins. Co. 292 Ill. 179. The question involved in the petition of Proehnow is solely upon the ground set forth in the petition, and the facts contained in the petition are not related to a fact which was unknown to the trial court, and which, if known, would have precluded rendition of judgment. Cramer v. Commercial Men's Ass'n. 260 Ill. 516. It therefore must appear that the error of fact within the meaning of Sec. 89 of the Practice act, which is substituted for the writ of error coram nobis (Cahill's Ill. Rev. Stats.) was not a part of the issue tried, and that the fact must be of such a nature as would conclusively prevent the entry of a judgment. Estate of John G. Gould v. Katson, 80 Ill. App. 242. There is no statement of fact appearing in the petition that would meet this rule, nor is there an error in fact which would entitle the petitioner to have the alleged error considered by the court for the purpose of setting aside the order complained of. The petitioner complains that his petition filed for relief was denied solely upon the petition itself and counter-affidavits offered by the attorney for the estate, and the court, not having heard evidence, erred in denying the motion. It is the uniform rule that courts may determine a petitioner's motion based upon a verified petition and counter-affidavits in opposition thereto without further hearing of evidence by the court and a jury. The court, therefore, did not err

sale, and the goods so seized, to his own use, and his action in the Probate Court, as well as in the Circuit Court, is well within the act to recover personal property taken or detained, or its converted value by the petitioner in this form of action.

This court has examined the questions called to the attention of the court, and are of the opinion that the proceeding before us is but an effort by respondent to have reviewed the findings of fact of the trial court. If a review was desired it should have been taken by appeal, or upon a writ of error to the court having jurisdiction of the cause. Dawson v. North Carolina Ins. Co., 287 Ill. 173. The question involved in the petition of respondent is clearly upon the ground set forth in the petition, and the facts contained in the petition are not related to a fact which was unknown to the trial court, and which, if known, would have produced evidence of importance. Crosser v. Commercial Nat'l Bank, 301 Ill. 41. It therefore must appear that the error of fact which [illegible] section 72, ch. 110 of the Practice Act, which is substantially the [illegible] Section 2-1401 (Smith's Ill. Rev. Stats.) [illegible] that the fact must be of such a nature as would conclusively convert the entry of a judgment. Estate of Dunn v. Dunn, [illegible] Ill. App. 242. There is no statement of fact appearing in the petition that would meet this rule, nor is there an error of fact which would nullify the petitioner in bringing the action error constituted by the court for the purpose of entitling him to the order [illegible]. The petitioner complained to [illegible] solely upon the petition filed [illegible] by the attorney for the petitioner, and the court, [illegible] erred in denying the petition. It is [illegible] determine a petitioner's action [illegible] counter-affidavits in opposition [illegible] evidence by the court in a jury. The court, therefore, is not [illegible]

in so disposing of the motion. Domitski v. American Linseed Co., 221 Ill. 161; Consolidated Coal Co. v. Geltien, 189 Ill. 85.

There is a further contention to be considered, and that is the contention of the petitioner that a supplemental decree was entered without jurisdiction and is void because an appeal was perfected from the decree by Marion G. Wilson, Executrix of the Estate of William Garnett, deceased, and that such appeal was perfected before the entry of the supplemental decree in this cause.

It appears from the condition of the appeal bond that the appeal is from the decree entered by the court, denying certain items and certain portions and amounts of the claim of Marion G. Wilson, Executrix, against Raymond E. Prochnow. The condition of the bond contains no reference to any portion of the decree, except the denial of allowance of certain items of her claim. Smyth v. Stoddard, 303 Ill. 424, and the appeal being from the portion of the decree denying her affirmative relief, the balance of the decree is unaffected and in full force and effect.

The conclusion reached by this court fully disposes of the questions which we regard as material and in disposing of the error assigned, for the reasons stated in the opinion, we are led to the conclusion that the trial court did not err in denying petitioner's motion to vacate the judgment order based upon the petition, which is in the nature of a writ of error coram nobis proceeding. Therefore, the order is affirmed.

ORDER AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.

in no disturbing of the motion. Dunlavy v. [illegible], 203 Ill. 193; Consolidated Coal Co. v. Haines, 180 Ill. 38.

There is a further contention to be considered, and that is the expression of the motion that a mechanical lapse was entered without jurisdiction and is void because an appeal was perfected from the decree by motion i. Wilson, Auditor of the Estate of William Garrett, deceased, and that such appeal was perfected before the entry of the supplemental decree in this cause.

It appears from the examination of the appeal bond that the appeal is from the decree entered by the court, imposing certain items and certain portions and amounts of the ratio of [illegible] Wilson, Executrix, against [illegible] v. [illegible]. The [illegible] of the bond [illegible] of allowance of certain items [illegible] decree. [illegible] v. Hendrick, 203 Ill. 444, and the [illegible] from the portion of the decree imposing but affirmative relief, the [illegible] decree is unaffected and in full force and effect.

The contention [illegible] the [illegible] of the conditions which [illegible] assigned, for the reason [illegible] in the [illegible] court. [illegible] contention that the [illegible] in denying [illegible] motion to vacate the judgment [illegible] is in the nature of a [illegible] Dunlavy v. [illegible], supra, the order is affirmed.

[illegible], J.o. [illegible] v. [illegible].

36998

FLORSHEIM SHOE COMPANY, a Corporation,
(Plaintiff) Defendant in Error,
v.
BENJAMIN D. RITHOLZ,
(Defendant) Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Opinion filed May 2, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The Florsheim Shoe Company, a corporation, brought suit against Benjamin D. Ritholz, the defendant herein, on a written guaranty securing the plaintiff against loss by reason of merchandise sold to L. S. & D. Berg. The consideration was for the sum of $1.00 and other good and valuable consideration and guaranteed the Florsheim Shoe Company full and prompt payment at maturity for any sales made to L. S. & D. Berg, whether said goods had been delivered or may thereafter be delivered and whether said sales were for cash or credit or otherwise, provided that the liability of the guarantor Ritholz should not exceed the sum of $1,000. The guaranty was in writing and waived any and all notices of any kind and character by the guarantor, and waived release by the guarantor because of any renewal of any indebtedness or the acceptance of any composition or otherwise. The guaranty also provided that it should be a continuing one and should remain in full force and effect until revoked in writing by the guarantor. The instrument was signed, "Benjamin D. Ritholz (Seal) Witnessed: L.S. Berg," and was dated August 23,1930.

Upon the trial the defendant sought to show an arrangement under which this instrument was delivered by him to one Rosenbloom with directions to Rosenbloom to hold the instrument until he received further instructions from the defendant. The proffered testimony of the conversation between Ritholz and Rosenbloom was ruled out, and properly so, as this conversation was not made in the presence

LORENZIA DOE DOMENEY, a corporation, (Plaintiff) defendant in error,	
v.	
Gustavin G. GITHOLD, (Defendant) plaintiff in error.	

Opinion filed May 2, 1934

MR. JUSTICE STONE DELIVERED THE OPINION OF THE COURT.

The Florenzia Doe Domeny, a corporation, brought suit against Gustavin G. Githolz, the defendant herein, on a written guaranty assuring the plaintiff against loss by reason of merchandise sold to L. S. & D. Berg. The nonfulfillment was for the sum of $1,00 and other good and valuable consideration and guaranteed the Florenzia Doe Domeny full and prompt payment of authority for any sales made to L. S. & D. Berg, whether said goods had been delivered or any thereafter to delivered and whether said sales were for cash or credit or otherwise, provided that the liability of the guarantor Githolz should not exceed the sum of $1,000. The guaranty was in writing and waived any and all notices of any sale and delivery by the guarantor, and waived notice by the plaintiff of any change of any renewal of any indebtedness or the commencement of any action or otherwise. The guaranty also provided that it should be continuing one and should remain in full force and effect until revoked in writing by the guarantor. The instrument was signed, "Gustavin G. Githolz (seal) witnesses: L. S. Berg," and was dated August 2, 1930.

Upon the trial the plaintiff sought to show a transaction under which this instrument was delivered by the defendant with directions to the salesman to hold the guaranty and not to be delivered further instructions from the defendant. The material testimony of the conversation between Githolz and the salesman was conflicting, and properly so, as this conversation was not made in the presence

of the plaintiff, nor was there any offer of proof to show that the plaintiff knew of any such secret arrangement. It is clear, however, that the instrument came into the hands of L. S. Berg, the debtor, one of the partners of L. S. & D. Berg, and by him delivered to the plaintiff.

On January 2, 1931, the amount due the plaintiff from Berg for goods sold amounted to over $10,500. This was reduced by payments so that by the end of April, 1931, there was a balance of approximately $9,000 and at the end of May, 1931, the account was further reduced to approximately $5,000. This later was reduced by the taking of an inventory by the plaintiff and the debtor of the stock on hand in the place of business of the debtor and the value of the goods having been mutually agreed upon, the stock was taken over by the plaintiff and the account of the debtor credited with the value of the goods leaving something over $3,000.due. The goods were subsequently consigned to the debtor, but nothing after this date was charged to the debtor and consequently the guarantor incurred no further liability by reason of his guaranty after that date. At the time of this consignment the goods were appraised and, so far as the evidence discloses, the appraisal was based upon the fair, cash market value of the goods at the time. No fraud is shown in the transaction nor in the reaching of the amount agreed upon between the debtor and the creditor.

It is insisted that the defendant being a guarantor, the instrument should be construed strictly and in his favor. This is not a correct statement of the law. The contract of guaranty, although that of surety, is to be construed liberally and in furtherance of its spirit to promote the use and convenience of commercial intercourse. Davis v. Wells, 104 U. S. 159; Tausig,etal v. Reid, et al, 145 Ill. 488. The instrument shows that it was given for a valuable consideration. Under such circumstances it is not necessary for the party guaranteed to notify the guarantor of his

of the plaintiff, nor was there any offer of proof to show that the plaintiff knew of any such secret arrangement. It is clear, however, that the instrument came into the hands of L. G. Berg, the debtor, one of the partners of L. G. & G. Berg, and by him delivered to the plaintiff.

On January 2, 1921, the overplus by the plaintiff from Berg for goods sold amounted to over $12,000. This was reduced by payments so that by the end of April, 1921, there was a balance of approximately $8,000 and by the end of May, 1921, the account was further reduced to approximately $3,000. This latter was reduced by the taking of an inventory by the plaintiff and the debtor of the stock on hand in the place of business of the debtor and the value of the goods having been mutually agreed upon, the stock was taken over by the plaintiff and the account of the debtor credited with the value of the goods leaving something over $3,000 due. The goods were subsequently consigned to the debtor, but nothing after this date was charged to the debtor and consequently the guarantor incurred no further liability by reason of his guaranty after that date. At the time of this consignment the goods were appraised and, so far as the evidence discloses, the original was based upon the fair, cash market value of the goods at the time. No fraud is shown in the transaction or in the running of the account agreed upon between the debtor and the creditor.

It is insisted that the delay at bring a guarantor, the instrument should be construed strictly and in his favor. This is not a correct statement of the law. The contract of guaranty, although that of surety, is to be construed liberally and in furtherance of its aims to promote the ease and convenience of commercial intercourse. Davis v. Jones, 104 S. W. 1091; Kennedy, etc. v. Reid, et al, 145 Ill. 488. The instrument shows that it was given for a valuable consideration. Under such circumstances it is not necessary for the surety guaranteed to notify the guarantor of his

acceptance. It is only where the instrument is in the nature of an offer that acceptance is required. Davis v. Wells, supra.

It is insisted that failure of the Florsheim Shoe Company, plaintiff herein, to notify the defendant of default in payment until several months after the debt matured, deprived the defendant of his right of subrogation. By the instrument itself the guarantor expressly waived service of any notice of default. Moreover, the guaranty by its express terms was a continuing absolute guaranty and the guarantor was not entitled to notice. His liability became fixed upon maturity of the indebtedness. Trusaik, et al v. Reid, et al, 145 Ill. 488.

The indebtedness of L. S. & D. Berg to the plaintiff far exceeded the amount of the claim of the plaintiff and in demanding and receiving a consignment of the goods from the debtor, the plaintiff was exercising its best efforts to reduce the indebtedness for the benefit of its guarantor. There was nothing in this precaution which was detrimental to the defendant.

We see no force in the argument that the instrument was prepared by the plaintiff. There was no fraud or duress in obtaining the signature of the defendant nor in procuring the execution of the instrument. Its terms were plain and unambigous and the liability of the guarantor therein was limited.

The trial court heard the witnesses and the evidence and we see no reason for disturbing the judgment. For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

acceptance. It is only where the instrument is in the nature of an offer that acceptance is required. Davis v. Wells, supra.

It is insisted that failure of the insurance company, plaintiff herein, to notify the defendant of default in payment until several months after the note matured, deprived the defendant of his right of subrogation. By the instrument itself the guarantor expressly waived service of any notice of default. Moreover, the guaranty by its express terms was a continuing absolute guaranty and the guarantor was not entitled to notice. His liability became fixed upon maturity of the indebtedness. Dunning et al v. Ryan et al, 148 Ill. 189.

The indebtedness of L. L. & C. owing to the plaintiff for excessive the amount of the claim of the plaintiff was in dispute and receiving a compromise of the goods from the debtor, the plaintiff was exercising its best efforts to reduce the indebtedness for the benefit of its guarantor. There was nothing in this compromise which was detrimental to the defendant.

We see no force in the argument that the instrument was procured by the plaintiff. There was no fraud or duress in obtaining the signature of the defendant nor in procuring the execution of the instrument. The terms were clear and [illegible] it was in pursuance of the guarantor that it was signed.

The trial court heard the witnesses in the cause and we see no reason for disturbing the judgment. For all reasons stated in this opinion, the judgment of the municipal court is affirmed.

Affirmed.

Gem, J., and Gri[illegible], J., concur.

37052

MARVIN F. TACKETT, for use of CHARLES A. WOLF,

Appellee,

v.

CHARLES CRESS, Garnishee, W. C. Tackett, Intervening Petitioner,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

275 I.A. 630

Opinion filed May 2, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Charles A. Wolf obtained a judgment in the Municipal Court of Chicago against Marvin F. Tackett and garnisheed certain funds in the hands of Charles Cress as garnishee. During the course of the proceeding William C. Tackett obtained leave to file his intervening petition. On the trial of the garnishment proceeding, without a jury, the issues were found in favor of the plaintiff (the judgment creditor) and from that judgment Cress, the garnishee, and William C. Tackett, intervening petitioner, have appealed to this court to review the judgment.

Marvin F. Tackett, the defendant, and William C. Tackett, the intervening petitioner, are brothers and are jointly liable on three notes. Marvin F. Tackett was liable as principal obligor, and William C. Tackett was an accommodation endorser. One of the notes was held by Beckman, receiver of the Lake View State Bank and the other two notes were held by Ridgeway, the receiver of the Sheridan Trust and Savings Bank. Cress had no interest in the transaction but was holding certain checks executed by Marvin F. Tackett which were deposited with him for the purpose of effecting a settlement of the indebtedness occasioned by the execution of the three notes. Cress was acting gratuitously and, consequently, had no lien upon the checks or the money represented thereby. The defendant Marvin Tackett, Cress and William C. Tackett met on or about November 8, 1932, at the office of William C. Tackett, the intervening

27032

MARVIN E. ROCKETT, for use of
CHARLES A. NOLF,

Appellee,

v.

CHARLES JONES, Cashier, E. C.
Rockett, Intervening Petitioner,

Appellants.

Appeal from
Circuit Court
of Williamson.

275 I.A. 630

Opinion filed May 3, 1934

MR. JUSTICE HIGBEE delivered the opinion of the court.

Charles A. Nolf obtained a judgment in the municipal Court of Chicago against Marvin E. Rockett and garnished certain funds in the hands of Charles Jones, a trustee. During the course of the proceeding William C. Rockett obtained leave to file his intervening petition. On the trial of the garnishment proceeding, without a jury, the issues were found in favor of the plaintiff (the judgment creditor) and from that judgment Jones, the garnishee, and William C. Rockett, intervening petitioner, have appealed to this court to review the judgment.

Marvin E. Rockett, the debtor, and William C. Rockett, the intervening petitioner, are brothers and co-partners in the sale of three notes. Marvin E. Rockett was their agent and financial manager, and William C. Rockett was an accommodation endorser. One of the notes was held by Goldman, trustee of the Goldman Realty Trust, and the other two notes were held by Jones, the trustee of the Sheridan Trust and Savings Bank. Jones had no interest in the transaction but was holding certain checks executed by Marvin E. Rockett which were delivered with him for the purpose of effecting a settlement of the indebtedness occasioned by the execution of the three notes. Jones was acting gratuitously and, consequently, had no lien upon the checks or the money represented thereby. The defendant Marvin Rockett, Jones and William C. Rockett met on or about November 8, 1932, at the office of William C. Rockett, the intervening

petitioner, at which time there was a discussion as to the obtaining of a compromise settlement of the debts due the bank. There was a tentative agreement to the effect that the judgment debtor would deposit the sum of $1,250 with Cress which was to be used in the event a compromise was successfully negotiated. At this time there was no definite understanding as to what the amount of the settlement would be. According to the garnishee nothing was said as to what was to be done with the money in the case of a failure to compromise the indebtedness but, on the other hand, the judgment debtor claims that the money was to be returned to him. No arrangement was made as to who was to receive the notes upon their cancellation. It was the understanding that the garnishee Cress was not to receive any compensation for acting as depositary and Cress testified that he undertook to act merely in order to carry out a friendly arrangement. On the same day Marvin F. Tackett deposited two cashier's checks for the sum of $500 each with the garnishee. These checks were payable to the order of the defendant Marvin F. Tackett, but were not endorsed. No further sum was deposited in order to make up the sum of $1,250 originally agreed upon. Within a day or two after this, the defendant and the garnishee called upon the receivers, or their representatives, and were requested to put their offer in writing. November 16, 1932, Cress wrote a letter to the receiver of the Sheridan Trust and Savings Bank, proposing that the receiver accept the sum of $500 cash and the release of an $1800 deposit claim, in full satisfaction of the obligation of Marvin F. Tackett to the Sheridan Trust and Savings Bank. Cress never received an answer to this communication.

November 21, 1932, Cress wrote a letter to Beckman, receiver of the Lake View Trust & Savings Bank, proposing that the receiver accept the sum of $500 in settlement of the Marvin F. Tackett note and also that the receiver release the assignment of a beneficial

petitioner, at which time there was a discussion as to the obtaining of a compromise settlement of the debts due the bank. There was a tentative agreement to the effect that the judgment debtor would deposit the sum of $1,500 with Irene which was to be used in the event a compromise was successfully negotiated. At this time there was no definite understanding as to what the amount of the settlement would be. According to the petitioner nothing was said as to what was to be done with the money in the case of a failure to compromise the indebtedness but, on the other hand, the judgment debtor claims that the money was to be returned to him. No arrangement was made as to who was to receive the notes upon their cancellation. It was the understanding that the remainder Irene was not to receive any compensation for acting as depositary and Irene testified that he undertook to act merely in order to carry out a friendly arrangement. On the same day Irene W. Tackett deposited two cashier's checks for the sum of $500 each with the garnishee. These checks were payable to the order of the defendant Irene E. Tackett, but were not endorsed. No further sum was deposited in order to make up the sum of $1,250 originally agreed upon. Within day or two after this, the defendant and his garnishee called upon the receivers, or their representatives, and were requested to put their offer in writing. November 16, 1937, Irene wrote a letter to the receiver of the Sheridan Trust and Savings Bank, stating that the receiver accept the sum of $1,000 and the release of an $800 le gal claim, in full satisfaction of the obligation of Irene W. Tackett to the Sheridan Trust and Savings Bank. They never received an answer to this communication.

November 23, 1937, Irene wrote a letter to Workman, receiver of the Lake View Trust & Savings Bank, and stating that the receiver accept the sum of $500 in satisfaction of the Irene E. Tackett note and also that the receiver release the garnishment of a certificate

interest in Westchester Park Realty Trust held as collateral to the note. No answer in writing was received to this communication and no direct answer received prior to the judgment entered in this cause in the suit of Rolf v. Marvin F. Tackett. Prior to November 29, the date upon which the garnishment writ was served upon Cress, he, Cress, was notified by the defendant, the judgment debtor Tackett, that he, Tackett, wanted his checks back, but that Cress replied that he could not return them as he was acting as an escrow. It also appears that the judgment debtor threatened the garnishee with suit unless the checks were returned. On the morning of November 29, 1932, about 11 o'clock the garnishment writ in this proceeding was served upon the garnishee and at this time the two checks in question were still in the garnishee's possession. On the same day about 9:15 o'clock in the morning, according to the testimony of one Hough, attorney for the intervening petitioner, he called upon certain persons connected with the auditor of public accounts for the purpose of discussing a compromise of the Tackett debts and according to the testimony of this witness a proposition was accepted by Ridgeway, as receiver, which was to accept the sum of $750 in cash and a release of the claim against the bank, and that Beckman, as receiver, was also to accept $750 in compromise of a liability on the judgment note of Marvin F. Tackett, guaranteed by the intervening petitioner. This compromise agreement of settlement, however, had to be first approved by the courts in which the dissolution proceedings of the two banks were pending. The order approving the compromise in the Sheridan Bank case was entered on December 2, 1932 and the Lake View State Bank settlement was approved December 31, 1932. So far as the record shows the approval of the defendant or judgment debtor herein was never obtained and he denies that he was ever notified that a settlement had ever been reached.

From the facts it is apparent that no complaint is made to

interest in Leatherbeater Park Reality Trust Pty. Ltd. is collateral to the note. No answer in writing was received to that communication and no direct answer received prior to the judgment entered in this court in the suit of Hall v. Irvin & Ozark. Prior to November 70, the date upon which the "settlement" with was entered upon trust, Mr. Irvin was notified by the defendant, the judgment debtor thereby, that Mr. Fockett, having his check book, but that Irvin realized that he could not return them as he was acting in an agency. It also appears that the judgment debtor thereafter thereafter the plaintiffs suit unless the cheques were returned. On the morning of November 70, 1970, about 11 o'clock the settlement suit in this proceeding was revived upon the plaintiffs and at that time two cheques in question were still in the plaintiff's possession. On the same day about 9:15 o'clock in the morning, according to the testimony of the young, attorney for the intervening creditor, he called on a certain business connected with the matter of public accounts for the purpose of discussing a compromise of the Fockett judgment according to the testimony of this witness a reconciliation was effected by Irvin, as receiver, which was to consist in the sum of [illegible] in cash and payment of the claim against the bank, and that another, [illegible], was to pay $750 in consideration of a liability on the part that [illegible] Fockett, guaranteed by the corporation [illegible]. [illegible] agreement of settlement, however, was to be first approved by the courts in which the resolution proceedings of the [illegible] were pending. The other negotiations [illegible] in the matter, [illegible] was entered on December 1, 1970 [illegible] settlement was approved December 11, 1970. [illegible] approval of the treatment of judgment debtor [illegible] and he denies that he was ever notified [illegible] were been treated.

From the notes it is apparent that no complaint is made to

the judgment of the plaintiff Wolf against the defendant Marvin W. Tackett. Neither does it appear that the receivers of the banks in question make any claim to the cashier's checks, nor does it appear that the garnishee Cress had any claim to or interest in the checks either directly or by way of a lien. W. C. Tackett, the intervening petitioner, had no direct right, title or interest in or to the checks. So far as the record discloses Cress was holding these checks as a stake holder or a gratuitous bailee and had no interest in them and no rights that were to be protected. The judgment debtor who deposited the checks with him is making no claim in this proceeding and consequently the position of Cress is that of a third party with no interest in the fund in his possession or in its disposition by the court. So far as we gather from the record it appears to be the claim of the intervening petitioner that the checks were deposited with Cress for his, William C. Tackett's benefit and therefore he has an equitable interest in the fund. There appears to be no mutuality in the agreement surrounding the deposit of the checks by the judgment debtor with Cress as William C. Tackett was not called upon to contribute anything to the fund and no consideration passed from him by reason of the transaction. There was no arrangement between the parties as to how long the checks were to remain in the hands of Cress and the trial court evidently took the position that the deal not having been closed, the judgment debtorhad the right to terminate after a reasonable length of time, which he did by a demand for repossession of his checks.

It is further insisted on behalf of the plaintiff in the original garnishment proceeding that the checks not having been endorsed, it was apparent there was not a complete and unconditional delivery, and there is considerable force in this argument.

the judgment of the plaintiff sole against the defendant Irvin V. Tackett. Neither does it appear that the receivers of the banks in question make any claim to the creditor's checks, nor does it appear that the plaintiffs herein had any claim to or interest in the checks either directly or by way of a lien. R. C. Tackett, the intervening petitioner, had no legal right, title or interest in or to the checks. So far as the record discloses there was holding these checks as a state auditor or a gratuitous bailee and had no interest in them and no rights that were to be protected. The judgment debtor who deposited the checks with him is making no claim in this proceeding, and consequently the matter of issue is that of a third party with no interest in the fund in his possession or in its disposition by the court. So far as we gather from the record it appears to be the claim of the intervening petitioner that the checks were deposited with Irvin for his, Tilden C. Tackett's benefit and therefore he has an equitable interest in the fund. There appears to be no authority in the statute authorizing the deposit of the checks by the judgment debtor with [illegible]. Tackett was not [illegible] to [illegible] and no consideration passed from him by reason of the deposition. There was no arrangement between the [illegible] and checks were to remain in the hands of [illegible] and it appears certainly took the position that the fund had ceased being [illegible], the judgment debtorhad the right to terminate [illegible] at any time, which he did by a demand for [illegible] of its owners.

It is further insisted on behalf of the [illegible] in the original judgment proceeding that [illegible] or being been endorsed, it was apparent there [illegible] delivery, and there is consider[illegible] in this argument.

The intervening petition herein was not filed until late in the proceeding. No settlement could have been made in any event as the checks were not sufficient in amount to cover the contemplated settlement and there appears to have been no definite arrangement to the effect that the intervening petitioner was to make good the balance. Neither was the total amount of $1,250 deposited with Cress, as agreed upon. The entire transaction was ambiguous and the checks deposited could not have been of any value until endorsed by the judgment debtor. The trial court heard the evidence and saw the witnesses and came to the conclusion that the judgment debtor had the right within a reasonable time to demand the return of his securities and we see no reason for holding otherwise under the facts presented.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HENEL, J. CONCUR.

The intervening petition herein was not filed until late in the proceeding. No settlement could have been made in any event as the checks were not sufficient in amount to cover the contemplated settlement and there appears to have been no definite arrangement to the effect that the intervening petitioner was to make good the balance. Neither was the total amount of $1,[illegible]00 mentioned with dress, as agreed upon. The entire transaction was ambiguous and the checks deposited could not have been of any value until endorsed by the judgment debtor. The trial court heard the evidence and saw the witnesses and came to the conclusion that the judgment debtor had the right within a reasonable time to learn the return of his securities and we see no reason for holding otherwise under the facts presented.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JOHN J. [illegible]

HALL, J.J., and [illegible], J., concur.

37064

B. GIVEN,

Appellee,

v.

HATTIE H. LOFTON,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

275 I.A. 630[3]

Opinion filed May 2, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought his action in forcible entry and detainer to recover possession of certain premises located in Chicago. The trial was had by the court without a jury and a judgment was entered in favor of the plaintiff, finding that the defendant, Hattie H. Lofton, was unlawfully withholding possession of the premises described in the complaint and against the right to possession by the plaintiff. The defendant filed her petition asking to have the action dismissed for want of notice in compliance with the statute. The motion was reserved for the hearing and the cause coming on to be heard the notices were submitted to the court. The notice of intention to forfeit bears date of May 3, 1933. The suit was started June 11, 1933.

The defendant was in possession of the property under a contract to purchase and the action comes within sub-section 5 of par. 2 of the Forcible Entry and Detainer Act, Cahill's Illinois Revised Statutes, 1933. Paragraph 3 of the act provides that in an action in forcible entry to obtain possession under such a contract, a demand for possession shall be made at least 30 days prior to the institution of such proceeding. The instrument served in this case is not a demand, but a notice stating that the defendant is in default, describing the premises and notifying the defendant that unless the payments are made within 30 days the contract will be forfeited and steps taken to recover possession of the property.

June 6, 1933, a second notice of default was served in

37064

B. GIVEN,

Appellee,

v.

HATTIE B. LOWTHE,

Appellant.

Opinion filed May 3, 1934

MR. JUSTICE ALBERT SMITH delivered the opinion of the court.

Plaintiff brought his action in forcible entry and detainer to recover possession of certain premises located in Chicago. The trial was had by the court without a jury and a judgment was entered in favor of the plaintiff, finding that the defendant, Hattie B. Lowthe, was unlawfully withholding possession of the premises described in the complaint and against the right to possession by the plaintiff. The defendant filed her petition praying to have the action dismissed for want of notice in conformance with the statute. The motion was reserved for the hearing and the cause coming on to be heard the notices were submitted to the court. The notice of intention to forfeit bears date of May 7, 1932. The suit was started June 11, 1932.

The defendant is a lessee of the property under a contract to purchase and the action comes within sub-section 3 of par. 2 of the forcible entry and detainer act, Smith's Illinois Revised Statutes, 1933. Paragraph 7 of the act provides that in an action in forcible entry to obtain possession under such a contract, a demand for possession shall be made in writing by the plaintiff to the institution of such proceedings. The instrument served in this case is not a demand, but a notice stating that the defendant is in default, requesting the premises, or notifying the defendant that unless the payments are made within 30 days the contract will be forfeited and giving a date to recover possession of the property.

June 9, 1932, a second notice of default was served in

which the plaintiff elected to terminate the contract and stated that the payments made thereunder had been forfeited and that the right to take possession would be immediately exercised. This notice, however, was filed less than 30 days before the institution of the suit.

Plaintiff insists that the first notice was sufficient in that the statute does not require a demand but simply a notice and that the instrument of May 3, 1933, satisfies the statute. The action of forcible entry and detainer is a strict statutory remedy and must be strictly followed. The statute itself does not state that a notice is sufficient but that a demand shall be made and sets up a form which answers the requirement. The notice in this case was not an unequivocable demand for possession but a simple notification that steps would be taken to recover possession if the amounts due were not paid. We do not believe it answered the requirements of the statute. The service of the second demand indicates that plaintiff was not satisfied in his own mind with his original notification.

It is unfortunate that plaintiff should be delayed in recovering possession of the property, as there appears to be no defense other than the technical objection stated. In order to comply with the statute the demand should be unequivocable. There is nothing to prevent plaintiff from instituting a new proceeding provided the proper steps required by the statute are followed.

For the reasons stated in this opinion the judgment of the Municipal Court is reversed.

JUDGMENT REVERSED.

HALL, P.J. AND HEBEL, J. CONCUR.

which the plaintiff elected to terminate the contract and stated that the payments made thereunder had been terminated and that the right to take possession would be immediately exercised. This notice, however, was filed less than 30 days before the institution of the suit.

Plaintiff insists that the first notice was sufficient in that the statute does not require a demand but merely a notice and that the instrument of May 2, 1951, satisfies the statute. The action of forcible entry and detainer is a statutory remedy and must be strictly followed. The statute itself does not state that a notice is sufficient but that a demand shall be made and sets up a form which requires the payment. The notice in this case was not an unequivocal demand for possession but a simple notification that there would be trouble to recover possession if the amounts due were not paid. We do not believe it measures the requirements of the statute. The service of the second demand indicates that plaintiff was not satisfied in its own mind as to the original notification.

It is unfortunate that plaintiff chose to employed an recovering possession of [illegible] property, [illegible] in a manner other than the economical [illegible]. [illegible] with the statute the demand should [illegible]. There is nothing to prevent plaintiff from instituting a [illegible] proceeding [illegible] proper remedy provided by the statute [illegible].

For the reasons set out in this opinion the judgment of the municipal court is reversed.

[illegible]

Kane, J., [illegible], J., concur.

37087

In the Matter of the Application of Elizabeth G. Richter to Register Title, L. R. No. 2593.

Petition AUGUST A. TIMKE, EMMA J. GLOS, D. ARNOLD, CLARA G. BATES, FORMERLY Clara L. Glos, ALBERT H. GLOS, MABELLE G. LARKIN, formerly Mabelle L. Glos, ELMHURST STATE BANK, an Illinois Corporation, as Trustee, CONTINENTAL ILLINOIS BANK AND TRUST COMPANY-GUARDIAN of the Estates of Gardiner Glos and Corbin Glos, minors,

Appellants,

v.

HENRY M. SELIGMAN,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

275 I.A. 630[4]

Opinion filed May 2, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

On June 12, 1908, Elizabeth G. Richter made application to register 5 vacant lots situated in Cook County. Among other interests recited in the petition as being affected by the registration were 5 tax deeds issued to one D. Arnold, one of the petitioners in the proceeding now here.

On January 16, 1907, Arnold executed a trust deed on said lots to Jacob Glos, trustee, for a stated sum.

October 30, 1908, the examiner's report was filed showing a hearing, attended by Jacob Glos in person and D. Arnold, by his attorney.

November 25, 1908, a decree was entered in conformity with the report declaring the tax deeds void and setting them aside on condition that Elizabeth Richter pay to D. Arnold, or the clerk of the court for his use, and to Jacob Glos, or to the clerk of the court for his use, a certain sum of money amounting to $701.80, which was to cover the amount expended by these two, Arnold and Glos, in and about securing their tax deeds. This money was to be paid immediately or within three days after the entry of the decree and this deposit was made with the clerk of the court November 28, 1908, in accordance with the order.

37907

In the Matter of the Application of Elizabeth D. Mishler to register title, L. M. No. 2383.	
Petition ADDRET A. FIRST, [illegible] L. [illegible], D. [illegible], [illegible] D. [illegible], [illegible] Claire [illegible]. Olse, [illegible] [illegible] D. [illegible], Temperly [illegible] L. Olse, [illegible] [illegible] STATE BANK, an Illinois corporation, as Trustee, Commissioner [illegible] BANK AND TRUST COMPANY-[illegible] of the Estates of Dorothy Olse and Jordin Olse, minors,	[illegible] [illegible] [illegible]
appellants,	
v.	
HENRY A. [illegible],	
appellee.	

Opinion filed May 2, 1934

Mr. JUSTICE [illegible] delivered the opinion of the court.

On June 13, 1928, Elizabeth D. Mishler made application to register 3 vacant lots situated in Cook county. Many other interests resulted in the petition as being affected by the registration were 5 tax deeds issued to one G. [illegible], one of the petitioners in the proceeding now here.

On January 18, 1927, Israel executed a trust deed on said lots to Jacob Olse, trustee, for a stated sum.

October 30, 1928, the commissioner's report was filed showing a hearing, attended by Jacob Olse in person and [illegible], by his attorney.

November 26, 1928, a decree was entered in conformity with the report declaring the tax deeds void, and quieting title in petition that Elizabeth Mishler pay to G. [illegible], or the clerk of the court, for his use, and to Jacob Olse, or to the clerk of the court for his use, a certain sum of money amounting to $[illegible], which was to cover the amount exacted by these tax [illegible], in and about securing their tax deeds. This money was to be paid immediately or within three days after the entry of the decree and this decree was made with the clerk of the court November 26, 1928. In compliance with the

January 12, 1911, an order appears of record in the proceeding which appears to have been based upon the motion of the complainant, Elizabeth G. Richter, directing the clerk of the court to pay said sum so deposited with him to Elizabeth G. Richter or to her solicitor, Henry M. Seligman. Pursuant to this order this sum was paid to Seligman, as solicitor.

April 15, 1931, approximately 22½ years after the order was entered in this case, requiring the money to be deposited with the clerk of the court in satisfaction of the claims of Glos and Arnold, and approximately 20 years after the order entered in the Circuit Court authorizing the complainant in the original proceeding to withdraw this money, this petition asking to have the order of January 12, 1911, vacated, was filed herein.

The prayer of the petition appears to be based upon the proposition that the petitioners had no notice of the proceeding to obtain the deposit by the complainant and had no knowledge of the entry of the order. A demurrer was sustained to the original petition and to an amended petition, and leave to file the last amended petition was denied, from which ruling this appeal has been perfected. D.Arnold, one of the defendants in the original registration proceeding and petitioner here, is still living. Jacob Glos died October 6, 1928, approximately 20 years after the entry of the original order or decree and his heirs are petitioners here. No reason is advanced as to why the delay on the part of the petitioners to collect the amount deposited to their order with the clerk of the court.

Reliance on the vacation of the order of January 12, 1911, is based upon the alleged fact that no notice was given prior to the entry of said order or of the fact that the complainant in the original proceeding was asking to have the money refunded. Claims such as these come under the head of stale claims and the courts will not aid

January 12, 1911, an order appears of record in the proceeding which appears to have been based upon the motion of the complainant, Elizabeth G. Lobber, directing the clerk of the court to pay said sum so deposited with him to Elizabeth G. Lobber or to her solicitor, Henry E. Pelligrom. Payment in this order this sum was paid to Pelligrom, as solicitor.

April 12, 1911, approximately [illegible] years after the order was entered in this case, requiring the money to be deposited with the clerk of the court in actual sum of the filing of this and should, and approximately [illegible] years after the order entered in the circuit court authorizing the commitment in the original proceeding to withdraw this money, this petition, seeking to have the order of January 12, 1911, vacated, was filed herein.

The prayer of the petition appears to be based upon the proposition that the petitioners had no notice of the proceeding to obtain the deposit by the commitment and had no knowledge of the entry of the order. A demurrer was sustained to the original petition and to an amended petition, [illegible] the last amended petition was denied, from which ruling this appeal has been perfected. Obviously, one of the determinate in the original [illegible] proceeding and petitioner here, is still living. Deed dated October 6, 1899, approximately [illegible] years after the entry of the original order of decree and his heirs are petitioners here. No reason is assigned as to why the delay on the part of the petitioners in [illegible] the amount deposited to their order with the clerk of the court.

Reliance on the vacation of the order of January 12, 1911, is based upon the alleged fact that no notice was given either to the entry of said order or of the fact that the commitment in the original proceeding was seeking to have the money refunded. Cases where in these cases under the head of stale claims and the courts will not aid

parties who themselves exercise no diligence on their own behalf. The order of January 13th was entered in the proceeding in which petitioners were parties and was a matter of record, of which they could easily have been cognizant by exercising any care whatsoever.

The Supreme Court of this state in the case of Mason v. Odum, 210 Ill. 471, said:

> "We have held that where the question of laches is involved, facts which would put a person of ordinary prudence upon inquiry will charge him with such notice as could have been obtained if such inquiry had been made. (Coolidge v. Rhodes, supra.) All of the county court proceedings had been a matter of record for twenty-four years, and during six of these twenty-four years Richard Odum was of age and had every opportunity to inform himself as to the true conditions of affairs, and yet he neglected to assert the claim he now makes until this bill was filed."

The question as to whether or not there was laches in any particular case is one which rests in the discretion of the court in view of all the surrounding circumstances. Cory v. City of Hillsboro, 205 Ill. App. 49. Where no good reasons appear from the evidence or the allegations of the petition why the petitioners with knowledge of the facts should wait 20 years or more before taking action, the defense of laches may be interposed. Ulrich v. Cress, 85 Ill. App.101.

This cause is entitled, "In the Matter of the Application of Elizabeth G. Richter to Register, Title, L. R. No. 2593. etc." Petitioners in their reply brief state that the order to withdraw the fund was registered in the land registration proceeding and that the petition was entitled as in that proceeding. The statute concerning land registration proceedings provides that an appeal shall be taken to the Supreme Court. In view of the fact, however, that petitioners have seen fit to perfect the appeal to this court on the theory that only the deposit with the clerk is involved, we have

parties who themselves exercise no influence on their own behalf. The order of January 12th was entered in the proceeding in which petitioners were parties and was a matter of record, of which they could easily have been cognizant by exercising any care whatsoever.

The Supreme Court of this state in the case of Essex v. Odum, 210 Ill. 471, said:

> "We have held that where the question of laches is involved, there which would put a person of ordinary prudence upon inquiry will charge him with such notice as could have been obtained if such inquiry had been made. (Coulthas v. Dodge, supra.) All of the county court proceedings had been a matter of record for twenty-four years, and during six of these twenty-four years Richard Odum was of age and had every opportunity to inform himself as to the true conditions of affairs, and yet he neglected to assert the claim he now makes until this bill was filed."

The question as to whether or not there was laches in any particular case is one which rests in the discretion of the court in view of all the surrounding circumstances. Dorr v. City of Kilgore, 205 Ill. App. 49. There no good reasons appear from the evidence or the allegations of the petition why the petitioners with knowledge of the facts should wait 20 years or more before taking action, the defense of laches may be interposed. Kirkpatrick v. Essex, 85 Ill. App.101.

This cause is entitled, "In the matter of the application of Elizabeth C. Hooker to register title, L. T. No. 8000, etc." Petitioners in their reply brief state that the order to withdraw the fund was registered in the land registration proceeding and that the petition was entitled as in that proceeding. The statute governing land registration proceedings provides that an appeal shall be taken to the Supreme Court. In view of the fact, however, that petitioners have been ill to perfect the appeal to this court on the theory that only the laches with the clerk is involved, we have

assumed jurisdiction and passed upon the merits of the claim.

From the facts we are of the opinion that the chancellor of the Circuit Court correctly held that there was laches in the filing of the petition and no good cause shown for the delay and properly denied leave to file the last amended petition. Moreover, every intendment is indulged in favor of the regularity of the proceeding.

For the reasons stated in this opinion the order denying leave to file the amended petition is affirmed.

ORDER AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

assumed jurisdiction and passed upon the merits of the claim.

From the facts as are of the opinion that the chancellor of the Circuit Court correctly held that there was laches in the filing of the petition and no good cause shown for the delay and properly denied leave to file the last amended petition. Moreover, every intendment is indulged in favor of the regularity of the proceeding.

For the reasons stated in this opinion the order denying leave to file the amended petition is affirmed.

CONCUR: ATTIGNEY.

HALL, P.J., and HAMES, J., DISSENT.

37096

HAMLIN K. BUCHMAN,

Appellant,

v.

HOWARD F. BISHOP,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

275 I.A. 631

Opinion filed May 2, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order sustaining a general and a special demurrer to plaintiff's declaration and, upon plaintiff's election to stand by his declaration, dismissing the suit at plaintiff's cost.

The declaration charges that the plaintiff Hamlin K. Buchman is a duly licensed attorney at law and was on May 1, 1928, a duly appointed and acting attorney for the Village of Riverdale in the State of Illinois; that the defendant Howard F. Bishop was also a duly licensed attorney at law and was a member of the law firm of Lyman, Adams, Bishop & Dupee and, as agent of said firm, verbally agreed with the plaintiff that if the firm should be appointed by the Board of Local Improvements for the Village of Riverdale, as attorneys, that in consideration of the plaintiff attending the meetings of the Board of Local Improvements for the fiscal year, commencing with the first of May, 1928, and despatching such work in connection therewith as should be given to the said plaintiff by Lyman, Adams, Bishop & Dupee that the plaintiff was to receive for his services so rendered 25% of all moneys, special assessments, vouchers and/or warrants and any other consideration paid said Lyman, Adams & Dupee for services rendered as attorneys for the Board of Local Improvements of said village; that pursuant to said agreement plaintiff personally attended each and every meeting of the Board of Local Improvements and despatched such work as was delegated to him to be done by the said firm of Lyman, Adams, Bishop & Dupee; that on or about the first day

37028

HARLIN L. GOSNELL,

Appellant,

v.

HOWARD E. BINGER,

Appellee.

Cook County.

265 I.A. 631

Opinion filed May 3, 1934

MR. JUSTICE ELDON delivered the opinion of the court.

This is an appeal from an order sustaining a general and a special demurrer to plaintiff's declaration and, upon plaintiff's election to stand by his declaration, dismissing the suit at plaintiff's cost.

The declaration charges that the plaintiff Harlin L. Gosnell is a duly licensed attorney at law and was on May 1, 1932, a duly appointed and acting attorney for the village of Riverside in the State of Illinois; that the defendant Howard E. Binger was also a duly licensed attorney at law and was a member of the law firm of Lyman, Adams, Binger and, as such of said firm, verbally agreed with the plaintiff that if the firm should be retained by the Board of Local Improvements for the village of Riverside, as attorney, that in consideration of the plaintiff performing the duties of the Board of Local Improvements for the fiscal year, commencing with the first of May, 1932, and transacting such work in connection therewith as should be given to the said plaintiff by said firm, Binger, Binger & Lyman that the plaintiff was to receive for his services in rendering all of all moneys, special assessments, warrants, bills or judgments and any other consideration that might arise from, those services rendered as attorney for the Board of Local Improvements of said village; that upon the said firm being retained, plaintiff personally attended each and every meeting of the Board of Local Improvements and discharged such work as was delegated to him to be done by the said firm of Lyman, Adams, Binger & Lyman; that on or about the first day

of June, 1928, certain proceedings were had by the Board of Local Improvements of said village for the paving of 138th street in said village and a contract was thereafter let and throughout said proceedings the firm of Lyman, Adams Bishop & Dupee acted as attorneys of record for the said village and were entitled to receive for their services the sum of $10,000 in special assessment warrants and/or vouchers; that at the time when the warrants and/or vouchers were to be issued said defendant Bishop conceived the fraudulent and deciettful plan of defrauding the firm of Lyman, Adams, Bishop & Dupee out of their interests and also the said plaintiff out of his interest and the said defendant conceived the plan of wrongfully misappropriating the said $10,000 worth of warrants and said vouchers to his own use; that on or about the first day of March, 1929, the plaintiff herein made application to the said firm of Lyman, Adams Bishop & Dupee for his share of the special assessment warrants or vouchers through its agent Bishop, but that said Bishop falsely and fraudulently advise the plaintiff that the said firm could not afford to pay the said plaintiff his pro rata share of the special assessment warrants and/or vouchers; that the said representations made by the said Bishop were material representations and were false and untrue, but that said plaintiff did not know that they were false; that said representations were made by Bishop for the purpose of converting the said warrants to his, Bishop's, own use; that relying upon said representations said plaintiff was induced to accept as and for his pro rata share in said special assessment warrants and/or vouchers the sum of $625.00; that plaintiff has since been advised and avers that the said firm did not oppose paying plaintiff 25% of said warrants or vouchers and did not have any knowledge that the said Bishop was possessed of same and that the payment of $625.00 to the plaintiff aforesaid was not made by the firm but by Bishop; that plaintiff tendered back the sum of $625.00 and has requested his

of June, 1928, certain proceedings were had by the Board of local Improvements of said village for the paving of 12th street in said village and a contract was thereafter let and thereupon said proceedings the firm of Lyons, [illegible] & Dupee served as attorneys of record for the said village and were entitled to receive for their services the sum of $[illegible] in accordance with vouchers and/or vouchers; that at the time when the vouchers and/or vouchers were to be issued a dispute arose concerning the fraudulent and deceitful plan of defrauding the firm of Lyons, Hishop & Dupee out of their interests and also the plaintiff out of his interest and the said defendant concealed the fact of wrongfully misappropriating the said [illegible] worth of a portion of said vouchers to his own use; that on or about the first day of March, 1929, the plaintiff herein made [illegible] to the said firm of Lyons, Hishop & Dupee for his share of the proceeds of assessment warrants or vouchers through its [illegible] Hishop, but the said firm [illegible] and fraudulently stole the plaintiff's share [illegible] firm could not effect to pay the [illegible] in spite of the [illegible] assessment warrants and/or vouchers; [illegible] made by the [illegible] and [illegible] and unions, but [illegible] that said requisitions were [illegible] by Hishop for the use of converting the said warrants to his own use; that [illegible] upon said requisitions said defendant was induced to assent as and for his pro rata share in said special assessment warrants and/or vouchers the sum of $[illegible]; that plaintiff was [illegible] and avers that the said firm did not oppose paying plaintiff [illegible] said warrants or vouchers and did not have any knowledge that the said Hishop was composed of some [illegible] that the payment of $[illegible] to the plaintiff otherwise was not made by the firm but by Hishop; that plaintiff received such the sum of $[illegible] and [illegible] his

full pro rata share of said special warrants and/or vouchers which amounts to the value of $2500.

From the declaration it appears that the agreement of plaintiff was with the firm of Lyman, Adams, Bishop & Dupee; that while the agreement was with Bishop, it was made with him as a member of and agent for said firm. It also appears from the declaration that the said firm knew of the agreement and represented and undertook to and did perform services for the Board of Local Improvements of the Village of Riverdale; that pursuant to the agreement with said Board of Local Improvements it received the sum of $10,000 worth of special assessment warrants and/or vouchers. While it is alleged in the declaration that these warrants and/or vouchers were received by Bishop, it must also be evident that they were received by him as agent for and as a member of said firm as charged in the declaration. It is no concern of the plaintiff that the said Bishop fraudulently intended to deprive the members of the firm of their interest. This would be a matter in which Bishop and his firm were alone interested. The fact that the warrants were issued and delivered was, necessarily, a matter of public record which would be known to plaintiff as attorney for the Village of Riverdale and he cannot be heard to make the claim that this was done without his knowledge. So far as the declaration is concerned the sole allegation as against the defendant Bishop appears to be that the plaintiff was deceived by reason of the fact that he, Bishop, stated that the firm of Lyman, Adams, Bishop & Dupee could not afford to pay the plaintiff the 25% of the special assessment warrants and/or vouchers and that, relying upon this statement, he accepted a less amount. We are unable to believe that this statement could be construed as such a false and fraudulent statement of a material fact as would entitle the plaintiff to recover. Such statements are matters purely of opinion and there were other sources from which plaintiff could have received

full pro rata share of said special warrants and/or vouchers which amounts to the value of $[illegible].

From the declaration it appears that the agreement of plaintiff was with the firm of Lyman, Adams, Blanchy & Dupee; that while the agreement was with Blanchy, it was made with him as a member of and agent for said firm. It also appears from the declaration that the said firm knew of the agreement and represented and undertook to and did perform services for the board of local improvements of the Village of Riverhide; that pursuant to the agreement with said board of local improvements it received the sum of $10,000 worth of special assessment warrants and/or vouchers. While it is alleged in the declaration that these warrants and/or vouchers were received by Blanchy, it must also be evident that they were received by him as agent for and as a member of said firm as charged in the declaration. It is no concern of the plaintiff that the said Blanchy fraudulently intended to deprive the members of the firm of their interest. This would be a matter in which Blanchy and his firm were alone interested. The fact that the warrants were issued and delivered was, necessarily, a matter of public record which would be known to plaintiff as attorney for the village of Riverhide and he cannot be heard to make the claim that this was done without his knowledge. So far as the declaration is concerned the sole allegation as against the defendant Blanchy appears to be that the plaintiff was deceived by reason of the fact that he, Blanchy, stated that the firm of Lyman, Adams, Blanchy & Dupee could not afford to pay the plaintiff the 88% of the special assessment warrants and/or vouchers and that, relying upon this statement, he accepted a less amount. We are unable to believe that this statement could be construed as such a false and fraudulent statement of a material fact as would entitle the plaintiff to recover. Such statements are matters merely of opinion and there were other sources from which plaintiff could have received

full information and particulars such as inquiring of other members of the firm with whom he had his contract.

Questions of financial worth and values are seldom the basis of actions for deceit. To words such as these the term "puffing" is applicable. In the same category would be statements of poverty and inability to pay. It is evident that the plaintiff was not induced to enter into any contractual relationship either with the defendant or his firm by reason of any false statements of material facts. It is also apparent that the plaintiff had no property right to thevvouchers or warrants themselves and was looking to the firm for payment out of the fees received by the firm of Lyman, Adams, Bishop & Dupee from the Board of Local Improvements of the Village of Riverdale. The sole position of plaintiff appears to be that he was deceived in arriving at a settlement with Bishop because of the statement of Bishop already referred to, namely, that the members of the firm could not afford to pay plaintiff his pro rata share.

We are not called upon to pass upon the question as to whether or not plaintiff has any claim, but are of the opinion that under the declaration he has not stated an action in deceit against the defendant. The court properly sustained the demurrer to the declaration.

For the reasons stated in this opinion the order of the Superior Court dismissing the suit and entering judgment for costs against the plaintiff is sustained.

ORDER AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

full information and particulars must be furnished of other members of the firm with whom he had his contract.

Questions of financial merit and values are seldom the basis of actions for deceit. In words such as these the term "putting" is applicable. In the case category would be statements of poverty and inability to pay. It is evident that the plaintiff was not induced to enter into any contractual relationship either with the defendant or his firm by reason of any false statements of material fact. It is also evident that the plaintiff had no property right to sharecrops or growing crops and the looking to the firm for payment out of the fees received by the firm of Lyman, Adams, Bishop & Ware from the board of local improvements of the Village of Laverdale. The sole condition of liability rests to be that he was deceived in entering or a settlement with Bishop because of the statement of these also by relating to, namely, that the members of the firm could not attend to my plaintiff's pro rata share.

We are not called upon to pass upon the question as to whether or not plaintiff has by claim, but are of the opinion that under the declaration he was not entitled to action in deceit against the defendant. The court properly sustained the demurrer to the declaration.

For the reasons stated in this judgment the order of the superior court dismissing the suit was entering judgment for costs against the plaintiff is affirmed.

Order affirmed.

Hall, P.J., Jones, J. Concur.

37120

FRANK M. DOOLEY, Executor of the Last Will and Testament of Effie Beam, deceased,

(Respondent) Appellant,

v.

LILLIAN STEVENS,

(Petitioner) Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

275 I.A. 631[2]

Opinion filed May 2, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

December 15, 1932, an order was entered in the Probate Court of Cook County directing Frank M. Dooley as executor of the estate of Effie Beam, deceased, to file a current account within thirty days from that date. From that order Dooley, as executor, prayed an appeal to the Circuit Court of Cook County. May 22, 1933, an order was entered in the Circuit Court dismissing the appeal. From this last order Dooley, as executor, prayed an appeal to this court.

The only question involved is whether or not the order of the Probate Court was a final order from which an appeal will lie. The Probate Court Act provides that appeals may be taken from final orders, judgments and decrees of the Probate Court to the Circuit Court in its particular county and that upon such appeal to the Circuit Court the cause shall be tried de novo.

A final judgment is one wherein a definite decision is made by the court hearing the cause, by which decision some question concerning the merits of the proceeding is involved. The order in this cause entered in the Probate Court was a ministerial order and in no way affected the merits of the proceeding pending therein. The Probate Court had the power to direct the filing of a current account for the purpose of ascertaining the condition of the estate.

37120

FRANK S. DOOLEY, Executor of the last will and testament of Effie Dean, deceased,

(Respondent) Appellant,

v.

LILLIAN STEVENS,

(Petitioner) Appellee.

Appeal from

Circuit Court

Cook County.

275 I.A. 631

Opinion filed May 2, 1934

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

December 18, 1933, an order was entered in the Probate Court of Cook County directing Frank S. Dooley as executor of the estate of Effie Dean, deceased, to file a current account within thirty days from that date. From that order Dooley, as executor, prayed an appeal to the Circuit Court of Cook County. May 21, 1934, an order was entered in the Circuit Court dismissing the appeal. From this last order Dooley, as executor, prayed an appeal to this court.

The only question involved is whether or not the order of the Probate Court was a final order from which an appeal will lie. The Probate Court not withstanding that appeals may be taken from final orders, judgments and decrees of the Probate Court to the Circuit Court in the particular county, that such appeal is to the Circuit Court sitting as a court of [illegible] and not [illegible].

A final judgment is one which, without indicating in made by the court hearing the cause, by which decision some question concerning the merits of the controversy is involved. The order in this cause entered in the Probate Court was a ministerial order and in no way affected the merits of the controlling matter involved. The Probate Court had the power to direct the filing of a current account for the purpose of ascertaining the condition of the estate.

The order appealed from was not a final order. Dow v. McArthur, 239 Ill. App. 539.

For the reasons stated in this opinion the judgment of the Circuit Court dismissing the appeal from the Probate Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

The order appealed from was not a final order. See v. Scarborough, 329 Ill. App. 539.

For the reasons stated in this opinion the judgment of the Circuit Court dismissing the appeal from the Probate Court is affirmed.

Judgment affirmed.

HALL, P.J. and BAKER, J. concur.

37132

JAMES BARATTA,

(Plaintiff) Appellee,

v.

BOWMAN DAIRY COMPANY, a Corporation,

(Defendant) Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

275 I.A. 631

Opinion filed May 2, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The plaintiff brought his action in trespass on the case against the defendant, Bowman Dairy Company, a corporation, to recover for personal injuries sustained on or about the 23rd of November, 1931, in the city of Chicago. The jury returned a verdict in favor of the plaintiff for $2,250 and judgment was entered upon the verdict from which this appeal has been perfected.

From the facts it appears that the plaintiff Baratta had parked his car on the north side of 39th street just east of Cottage Grove avenue, two intersecting streets in the city of Chicago. He had alighted from his automobile and was standing on the curb facing in a westerly direction, with one foot on the bumper of his car while talking to a friend. While the plaintiff was standing in this position a milk wagon owned by the defendant company collided with the car of the plaintiff, as a result of which the plaintiff was thrown upon the ground and received the injuries of which he complains. At the time of the accident there was no driver upon the wagon of the defendant company and the evidence of some of the witnesses indicates that the horse was running away at the time of the accident and zig-zagging from one side of the street to the other; that when the milk wagon hit the car of the plaintiff, which was a Chevrolet sedan, it dragged it a considerable distance down the street and nearly to the corner of 39th street and Lake Park avenue. There is also evidence that the horse was kicking and apparently trying to break away from the wagon. The driver of the milk wagon testified that he

371SS

JAMES BARATTA,

(Plaintiff) Appellee,

v.

BOHMAN DAIRY COMPANY, a Corporation,

(Defendant) Appellant.

Appeal from

Circuit Court,

Cook County.

Opinion filed May 2, 1934

Mr. JUSTICE SCANLAN delivered the opinion of the court.

The plaintiff brought his action in trespass on the case against the defendant, Bohman Dairy Company, a corporation, to recover for personal injuries sustained on or about the 22nd of November, 1931, in the city of Chicago. The jury returned a verdict in favor of the plaintiff for $7,250 upon which judgment was entered upon the verdict from which this appeal has been perfected.

From the facts it appears that the plaintiff Baratta had parked his car on the north side of 35th street just east of Cottage Grove avenue, two intersecting streets in the city of Chicago. He had alighted from his automobile and was standing on the curb facing in a westerly direction, with one foot on the bumper of his car while talking to a friend. While the plaintiff was standing in this position a milk wagon owned by the defendant company collided with the car of the plaintiff, as a result of which the plaintiff was thrown upon the ground and received the injuries of which he complains. At the time of the accident there was no driver upon the wagon of the defendant company and the evidence of some of the witnesses indicates that the horse was running away at the time of the accident and dragging from one side of the street to the other; that when the milk wagon hit the car of the plaintiff, which was a corporal being, it dragged it a considerable distance from the street and finally to the corner of 35th street and Cottage Grove avenue. There is also evidence that the horse was kicking and apparently trying to break away from the wagon. The driver of the milk wagon testified that he

attached the reins to the wagon and unfastened a tug. He did not tie the horse nor did he attach a weight. At the time of the accident he was eating in a nearby restaurant. There is ample evidence in the record to sustain the verdict and the judgment of the trial court.

It is insisted, however, that there was error in a remark of the court to the effect that counsel for the defendant was spending more time with the witness than the importance of his evidence deserved. The court subsequently instructed the jury to disregard the remark of the court and stated that it was not intended to indicate any view of the court on the weight of the testimony given by the witness. If there was any error in the remark, it was cured by the instruction of the court.

It is also insisted that the court erred in refusing defendant's instructions Nos. 7 and 8. These two instructions are substantially the same. They were to the effect that if the jury found that the injury was caused by a mere accident and without negligence on the part of the defendant, then the plaintiff could not recover. Both instructions Nos. 7 and 8, were abstract propositions of law. The jury was instructed on behalf of the defendant that the burden of proof was not upon the defendant to show that he was not guilty of negligence, but was upon the plaintiff to prove the defendant guilty of negligence. This instruction as given sufficiently covered the law of the case. There was no error in refusing instructions Nos. 7 and 8 offered on behalf of the defendant.

The declaration consisted of three counts. The first count charged negligence on the part of the defendant in the management and operation of its milk wagon; the second count charged the violation on the part of the defendant of an ordinance of the Municipal Code of Chicago which provided that no person should leave any horse attached to a wagon without securely fastening the same.

attached the reins to the wagon and unhitched a dog. He did not tie the horse nor did he attach a weight at the time of the accident he was eating in a nearby restaurant. There is ample evidence in the record to sustain the verdict and the judgment of the trial court.

It is insisted, however, that there was error in a remark of the court to the effect that counsel for the defendant was spending more time with the witness than the importance of his evidence deserved. The court subsequently instructed the jury to disregard the remark of the court and stated that it was not intended to indicate any view of the court on the weight of the testimony given by the witness. If there was any error in the remark, it was cured by the instruction of the court.

It is also insisted that the court erred in refusing defendant's instructions Nos. 7 and 8. These two instructions are substantially the same. They were to the effect that if the jury found that the injury was caused by a mere accident and without negligence on the part of the defendant, then the plaintiff could not recover. Both instructions Nos. 7 and 8, were abstract propositions of law. The jury was instructed on behalf of the defendant that the burden of proof was not upon the defendant to show that he was not guilty of negligence, but was upon the plaintiff to prove the defendant guilty of negligence. This instruction was given sufficiently covered the law of the case. There was no error in refusing instructions Nos. 7 and 8 offered on behalf of the defendant.

The declaration consisted of three counts. The first count charged negligence on the part of the defendant in the management and operation of its milk wagon; the second count charged the violation on the part of the defendant of an ordinance of the Municipal Code of Chicago which provided that no person should leave any horse attached to a wagon without securely fastening the same.

The third count charged a common law duty of the defendant to securely tie its horse and wagon so that persons would not be injured, and a disregard of this duty.

It is insisted that there was error in the record inasmuch as the testimony showed that the plaintiff was not struck by the milk wagon but by his own Chevrolet sedan; that because of this testimony there was a variance between the proof and the negligence charged in the declaration. The language as used in the declaration is as follows:

> "* * * defendant so negligently operated its horse-drawn vehicle that said wagon struck and collided with the plaintiff and the plaintiff's vehicle, thereby damaging plaintiff's vehicle and injuring the plaintiff."

It would not require a strained construction to reach the conclusion that this averment in the declaration sufficiently charged that the plaintiff was injured by reason of the wagon of the defendant striking the automobile of the plaintiff and thereby injuring the plaintiff. Moreover, the question of variance was not raised upon the trial of the cause and no opportunity given to the plaintiff to amend if he had so desired.

We are referred to the case of Buckley v. Handel Bros., 333 Ill. 368, wherein the Supreme Court in its opinion, said:

> "Where a variance between the declaration and the proof is clearly shown and is insisted upon at the trial, so that the plaintiff has an opportunity to amend his declaration, it is error for the court to refuse to direct a verdict for the defendant where the plaintiff fails or refuses to amend the declaration."

We do not believe the question of variance can be raised unless it is specifically pointed out upon the trial and cannot be reached by a motion for a directed verdict unless said motion is based upon the ground of variance.

The court in the case of Delating v. Kramer, 335 Ill. App. 359, in its opinion, says:

The third count charged a common law duty of the defendant to securely tie its horse and wagon so that persons would not be injured, and a disregard of this duty.

It is insisted that there was error in the record inasmuch as the testimony showed that the plaintiff was not struck by the milk wagon but by his own observed reason; that because of this testimony there was a variance between the proof and the negligence charged in the declaration. The language as used in the declaration is as follows:

> " " " defendant so negligently operated its horse-drawn vehicle that said wagon struck and collided with the plaintiff and the plaintiff's vehicle, thereby damaging plaintiff's vehicle and injuring the plaintiff."

It would not require a strained construction to reach the conclusion that this averment in the declaration sufficiently charged that the plaintiff was injured by reason of the wagon of the defendant striking the automobile of the plaintiff and thereby injuring the plaintiff. Moreover, the question of variance was not raised upon the trial of the cause and no opportunity given to the plaintiff to amend if he had so desired.

We are referred to the case of Bunkley v. Wabash Ryan., 212 Ill. 358, wherein the Supreme Court in its opinion, said:

> "Where a variance between the declaration and the proof is clearly shown and is insisted upon at the trial, so that the plaintiff has an opportunity to amend his declaration, it is error for the court to refuse to direct a verdict for the defendant where the plaintiff fails or refuses to amend the declaration."

We do not believe the question of variance can be raised unless it is specifically pointed out upon the trial and cannot be reached by a motion for a directed verdict unless said motion is based upon the ground of variance.

The court in the case of Wabash v. Ryan, 212 Ill. App. 358, in its opinion, says:

> "It is contended by counsel for appellee that the question of variance was not raised in the lower court, and for that reason it cannot be urged here. The record discloses that appellant moved for a directed verdict at the close of appellee's evidence, and again at the close of all the evidence, and it is contended by counsel for appellant he is therefore in a position to raise the question of variance in this court. We are of the opinion and hold that to raise the question of variance in this court it must have been specifically raised in the court below."

It does not appear from the record that the trial court's attention was directed toward the question of variance and it was, therefore, waived. The attending physician testified that he found bruises upon plaintiff's body; that the patella was injured, and that plaintiff's knee was in a cast for four weeks; that there were indications that there was a permanent injury to the synovial capsules; that upon his examination of the patient within a day or two after being called, he found crepitations which indicated inflammation around the pleura and that this condition existed for about 12 weeks.

The verdict was not large and we are unwilling to substitute our judgment as to the extent of the injuries for that of the jury which saw and heard the witnesses. We find no reversible error in the record and for that reason the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

> "It is contended by counsel for appellee that the question of variance was not raised in the lower court, and for that reason it cannot be raised here. The record discloses that appellant moved for a directed verdict at the close of appellee's evidence, and again at the close of all the evidence, and it is contended by counsel for appellant he is the close in a position to raise the question of variance in this court. We are of the opinion and hold that to raise the question of variance in this court it must have been specifically raised in the court below."

It does not appear from the record that the trial court's attention was directed toward the question of variance and it was, therefore, waived. The attending physician testified that a fourn bruises upon plaintiff's body; that the patella was injured, and that plaintiff's knee was in a cast for four weeks; that there were indications that there was a permanent injury to the synovial capsule; that upon his examination of the patient within a day or two after being called, he found crepitations which indicated inflammation around the joints and that this condition existed for about 12 weeks.

The verdict was not large and we are unwilling to substitute our judgment as to the extent of the injuries for that of the jury which saw and heard the witnesses. We find no reversible error in the record and for such reason the judgment of the circuit court is affirmed.

[illegible] Reversed.

HALE, W.J. and [illegible], J. dissent.

37141

COMMERCIAL LIGHT COMPANY, a Corporation,

Appellant,

v.

A. FISCHER,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

275 I.A. 631

Opinion filed May 2, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought its action on a written contract, under seal, dated May 12, 1926, to recover damages for a breach thereof on the part of the defendant. The execution of the agreement is not disputed and from its terms it appears that one Aaron Halperin and the defendant entered into an agreement under which the plaintiff undertook to furnish the labor and material and to construct certain ornamental street light posts on Clark street in the City of Chicago in front of the premises occupied by the defendant and Halperin agreed to operate and maintain said electric light posts for a period of five years and to supply the electricity, the cleaning of globes, the installation and renewal of all burned out lamps, etc. The defendant as the second party to the agreement in consideration therefor to pay upon the installation of the posts a specified amount set out, attached to and made a part of the agreement, and in addition thereto the sum of $7.37 per month for a period of 60 months.

It is uncontradicted that the installation of the posts was completed and that the defendant made an initial payment upon the cost of installation and continued the monthly payments for the services from October 8, 1926 to November 9, 1927, without complaint. The agreement in question was later assigned by Halperin to the Commercial Light Company, a corporation, and the plaintiff here. The contract also contained a provision to the effect that each of the undersigned subscribers warranted the fact that they were the owners of the property described and set out after their respective names.

37141

COMMERCIAL LIGHT COMPANY, a Corporation, Appellant, v. A. BIGGERS, Appellee.	ERROR FROM MUNICIPAL COURT OF APPEALS.

Opinion filed May 2, 1934

MR. JUSTICE GILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought its action on a written contract, under seal, dated May 12, 1926, to recover damages for a breach thereof on the part of the defendant. The execution of the agreement is not disputed and from its terms it appears that one Aaron Biggers and the defendant entered into an agreement under which the plaintiff undertook to furnish the labor and material and to construct certain ornamental street light posts on State street in the City of Chicago in front of the premises occupied by the defendant and Biggers agreed to operate and maintain said electric light posts for a period of five years and to supply the electricity, the cleaning of globes, the installation and removal of all burned out lamps, etc. The defendant as the second party to the agreement in consideration thereof for to pay upon the installation of the posts a specified amount set out, attached to and made a part of the agreement, and in addition thereto the sum of $7.27 per month for a period of 60 months.

It is unconstradicted that the installation of the posts was completed and that the defendant made an initial payment upon the cost of installation and continued the monthly payments for the months from October 2, 1926 to November 2, 1927, without complaint. The agreement in question was later assigned by Biggers to the Commercial Light Company, a corporation, and the plaintiff here. The contract also contained a provision to the effect that each of the undersigned subscribers warranted the fact that they were the owners of the property described and set out after their respective names.

Upon the trial defendant testified that he was not the owner of the property but a tenant and that he moved out of the premises on or about the date of the last monthly payment; that he called up the light company and told them to bill the new tenant and also stated the fact of his moving to the collectors of the company. We see no reason why the fact of his moving would absolve the defendant from liability under his written obligation. Notification of this fact to the collectors and the telephoning of same to the company could not operate as an extinguishment of the agreement. Nowhere in his testimony does the plaintiff state that the company agreed to release him from his obligation. It is also evident that even though the collectors had attempted to do so, it would have been unavailing as the collectors could not have done so unless the company had authorized it, either expressly or by implication.

The cause was tried by the court without a jury and a judgment was entered in favor of the defendant. This was error. The evidence shows no legal defense to the action on the written agreement and for that reason the judgment of the Municipal court is reversed and judgment entered here for the sum of $334.40, being the balance due and unpaid under the written agreement.

JUDGMENT REVERSED AND JUDGMENT HERE.

HALL, P.J. AND HEBEL, J. CONCUR.

Upon the trial defendant testified that he was not the owner of the property but a tenant and that he moved out of the premises on or about the date of the last monthly payment; that he called up the light company and told them to bill the new tenant and also stated the fact of his moving to the collectors of the company. He see no reason why the fact of his moving would absolve the defendant from liability under his written obligation. Notification of this fact to the collectors and the telephoning of some to the company could not operate as an extinguishment of the agreement. Somers in his testimony does the plaintiff state that the company agreed to release him from his obligation. It is also evident that even though the collectors had attempted to do so, it would have been unavailing as the collectors could not have done so unless the company had authorized it, either expressly or by implication.

The cause was tried by the court without a jury and a judgment was entered in favor of the defendant. This was error. The evidence shows no legal defense to the action on the written agreement and for that reason the judgment of the municipal court is reversed and judgment entered here for the sum of 224.40, being the balance due and unpaid under the written agreement.

JUDGMENT REVERSED AND JUDGMENT HERE.

HALL, P.J., AND MCGEE, J., CONCUR.

37489

JAMES L. GROSS,
Appellee,

vs.

FRED V. MAGUIRE, MABEL G. REINECKE, HARRY A. LIPSEY, Members of and Constituting the Board of Election Commissioners of the City of Chicago, ROBERT M. SWEITZER, County Clerk of Cook County,
(Defendants.)

On Appeal of THOMAS J. McNAMARA,
(Defendant) Appellant.

INTERLOCUTORY APPEAL FROM
CIRCUIT COURT OF COOK COUNTY

275 I.A. 631

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

On March 20, 1934, Gross, alleging himself to be interested as a taxpayer, filed a bill of complaint against the members of the board of election commissioners of the City of Chicago, Robert M. Sweitzer and Thomas J. McNamara, praying that the commissioners be enjoined from printing on the official ballot and Sweitzer from certifying to them for such printing the name of McNamara as a candidate for ward committeeman of the Democratic party of the 14th ward in the City of Chicago at the primary election to be held on April 10, 1934. A temporary injunction as prayed issued on March 21st without notice and without bond. The order, however, directed that complainant notify McNamara to appear in court on March 23, 1934, if he desired to move to vacate or dissolve the order. McNamara appeared at that time and made a motion to dissolve the injunction and to dismiss the bill. The court denied his motion. He filed notice of appeal to this court and perfected same. Upon his motion in this court a supersedeas was granted. His name therefore was printed on the official ballot.

Appellant has filed a brief in this court citing authorities to the proposition that the bill on its face disclosed a purely political matter concerning which a court of equity has

37489

JAMES L. GROSS,
Appellee,

vs.

FRED V. MADDIEN, MAMIE G. MAHAMARA,
HARRY A. LIPSKY, members of and
Constituting the Board of Election
Commissioners of the City of Chicago.
ROBERT M. SWEITZER, County Clerk of
Cook County,
(Defendants.)

On Appeal of THOMAS J. MAHAMARA,
(Defendant) Appellant.

275 I.A. 631

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

On March 20, 1934, Gross, alleging himself to be interested as a taxpayer, filed a bill of complaint against the members of the board of election commissioners of the City of Chicago, Robert M. Sweitzer and Thomas J. Mahamara, praying that the commissioners be enjoined from printing on the official ballot and Sweitzer from certifying to them for such printing the name of Mahamara as a candidate for ward committeeman of the Democratic party of the 14th ward in the City of Chicago at the primary election to be held on April 10, 1934. A temporary injunction as prayed issued on March 21st without notice and without bond. The order, however, directed that complainant notify Mahamara to appear in court on March 23, 1934, if he desired to move to vacate or dissolve the order. Mahamara appeared at that time and made a motion to dissolve the injunction and to dismiss the bill. The court denied his motion. He filed notice of appeal to this court and perfected same. Upon his motion in this court a supersedeas was granted. His name therefore was printed on the official ballot.

Appellant has filed a brief in this court citing authorities to the proposition that the bill on its face disclosed a purely political matter concerning which a court of equity has

no jurisdiction. Complainant has not filed any brief in support of the injunction order.

The primary election of April 10, 1934, is passed. It is apparent that any judgment or decree of this court cannot now determine in any way the rights of the parties to this controversy. In other words, the record as it stands presents for our consideration only a moot question. Such questions this court does not decide.

Conforming to the precedent in Lyle v. McKinlay, 229 Ill. App. 349, the appeal will be dismissed without costs to either party.

APPEAL DISMISSED.

O'Connor and McSurely, JJ., concur.

no jurisdiction. Complainant has not filed any brief in support of the injunction order.

The primary election of April 10, 1934, is passed. It is apparent that any judgment or decree of this court cannot now determine in any way the rights of the parties to this controversy. In other words, the record as it stands presents for our consideration only a moot question. Such questions this court does not decide.

Conforming to the precedent in Lyle v. Mehlhaff, 358 Ill. App. 349, the appeal will be dismissed without costs to either party.

APPEAL DISMISSED.

O'Connor and McGuire, JJ., concur.

37490

DANIEL BIBLIN,
Appellee,

vs.

FRED V. MAGUIRE, MABEL G. REINECKE, HARRY A. LIPSKY, Members of and constituting the Board of Election Commissioners of the City of Chicago, ROBERT M. SWEITZER, County Clerk of Cook County,
(Defendants).

On Appeal of JOSEPH P. CORR (Defendant), Appellant.

INTERLOCUTORY APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

275 I.A. 632

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On March 20, 1934, Biblin, alleging himself to be a resident of Chicago, taxpayer and voter, filed a complaint against Maguire et al., constituting the board of election commissioners of the City of Chicago, Robert M. Sweitzer, county clerk of Cook County, and Joseph P. Corr, praying that Sweitzer might be enjoined from certifying and the election commissioners from printing the name of Corr upon the official ballot as candidate of the Democratic party for ward committeeman of the 39th ward in the City of Chicago at the primary election to be held on April 10, 1934. The complaint was verified, and upon the same date a temporary injunction issued as prayed.

Thereafter Corr filed his motion to have this injunction set aside on the ground that the complaint on its face failed to state a cause of action of which a court of equity had jurisdiction, and moved that the court dismiss the complaint because of lack of jurisdiction. The motion was denied, and Corr perfected this appeal to this court. On his motion a supersedeas issued from this court, and his name was printed on the official ballot at the primary election. Appellant has filed a brief citing authorities to the effect that the controversy between the parties is purely political in its

37490

DARIUS HIRLIN,
Appellee,

vs.

PETER V. MADDIKE, MARK G. KRIEGER,
HARRY A. LIPSKY, members of and
constituting the Board of Election
Commissioners of the City of Chicago,
ROBERT M. SWEITZER, County Clerk of
Cook County,
(Defendants).

On Appeal of JOSEPH P. COHN (Defendant),
Appellant.

INTERLOCUTORY APPEAL
FROM CIRCUIT COURT
OF COOK COUNTY.

275 I.A. 632

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

On March 30, 1954, Hirlin, alleging himself to be a resident of Chicago, taxpayer and voter, filed a complaint against Maddike et al., constituting the board of election commissioners of the City of Chicago, Robert M. Sweitzer, county clerk of Cook County, and Joseph P. Cohn, praying that Sweitzer might be enjoined from certifying and the election commissioners from printing the name of Cohn upon the official ballot as candidate of the Democratic party for ward committeeman of the 39th ward in the City of Chicago at the primary election to be held on April 10, 1954. The complaint was verified, and upon the same date a temporary injunction issued as prayed.

Thereafter Cohn filed his motion to have this injunction set aside on the ground that the complaint on its face failed to state a cause of action of which a court of equity had jurisdiction, and moved that the court dismiss the complaint because of lack of jurisdiction. The motion was denied, and Cohn perfected this appeal to this court. On his motion a supersedeas issued from this court, and his name was printed on the official ballot at the primary election. Appellant has filed a brief citing authorities to the effect that the controversy between the parties is purely political in its

nature and that a court of equity is therefore without jurisdiction. Plaintiff has not filed any brief in support of the order for an injunction.

The primary of April 10, 1934, is now past, and it is apparent that any judgment or decree which might be entered by this court could not in any way affect the substantial rights of the parties to this litigation. In other words, the record as it now stands presents for our consideration purely and simply a moot question. Under such circumstances, following the rule laid down in Lyle v. McKinlay, 229 Ill. App., 349, the appeal will be dismissed without costs against either party.

APPEAL DISMISSED.

O'Connor and McSurely, JJ., concur.

nature and that a court of equity is therefore without jurisdiction. Plaintiff has not filed any brief in support of the order for an injunction.

The primary of April 10, 1934, is now past, and it is apparent that any judgment or decree which might be entered by this court could not in any way affect the substantial rights of the parties to this litigation. In other words, the record as it now stands presents for our consideration purely and simply a moot question. Under such circumstances, following the rule laid down in Lyle v. Kerkhiley, 293 Ill. App., 549, the appeal will be dismissed without costs against either party.

APPEAL DISMISSED.

O'Connor and McGuire, JJ., concur.

37491

LEO V. ROEDER,
Appellee,

vs.

FRED V. MAGUIRE, MABEL G. REINECKE, HARRY A. LIPSKY, Members of and Constituting the Board of Election Commissioners of the City of Chicago, ROBERT M. SWEITZER, County Clerk of Cook County, and JOHN D. GIBBONS, (Defendants).

On Appeal of JOHN D. GIBBONS, (Defendant), Appellant.

APPEAL FROM INTERLOCUTORY ORDER OF CIRCUIT COURT OF COOK COUNTY.

23

275 I.A. 632

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On March 19, 1934, plaintiff Roeder filed his bill of complaint in the Circuit court of Cook county in chancery against the members of the board of election commissioners of the City of Chicago, Robert M. Sweitzer, county clerk of Cook county, and John D. Gibbons. The bill alleged plaintiff to be a citizen, resident, taxpayer and legally qualified voter of the 25th ward, averred a petition by defendant John D. Gibbons to be defective and prayed that Sweitzer as county clerk might be enjoined from certifying and the board of election commissioners from printing on the primary ballot the name of said John D. Gibbons as a candidate for ward committeeman of the Democratic party for the 25th ward in the City of Chicago at the primary election to be held on April 10, 1934.

A temporary injunction issued as prayed. Defendant Gibbons appeared and moved to vacate and dissolve this injunction for want of equity on the face of the bill. The motion was denied, and he perfected this appeal from that order. On motion of Gibbons a supersedeas was granted in this court, and his name was duly printed on the official ballot. In support of his appeal he has filed a brief citing authorities to the proposition that the matter in controversy is purely political and a court of equity wholly without jurisdiction for that reason.

37491

LEO V. ROKEAH,
Appellee,

vs.

FRED V. MADDIGAN, MARGE G. HEALNICKE, MARY A. LIPSKY, Members of and Constituting the Board of Election Commissioners of the City of Chicago, ROBERT M. SWEITZER, County Clerk of Cook County, and JOHN D. GIBBONS, (Defendants).

APPEAL FROM INTERLOCUTORY ORDER OF CIRCUIT COURT OF COOK COUNTY.

On Appeal of JOHN D. GIBBONS, (Defendant), Appellant.

275 I.A. 632

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On March 19, 1934, plaintiff Rokeah filed his bill of complaint in the Circuit court of Cook county in chancery against the members of the board of election commissioners of the City of Chicago, Robert M. Sweitzer, county clerk of Cook county, and John D. Gibbons. The bill alleged plaintiff to be a citizen, resident, taxpayer and legally qualified voter of the 25th ward, averred a petition by defendant John D. Gibbons to be defective and prayed that Sweitzer as county clerk might be enjoined from certifying and the board of election commissioners from printing on the primary ballot the name of said John D. Gibbons as a candidate for ward committeeman of the Democratic party for the 25th ward in the City of Chicago at the primary election to be held on April 10, 1934.

A temporary injunction issued as prayed. Defendant Gibbons appeared and moved to vacate and dissolve this injunction for want of equity on the face of the bill. The motion was denied, and he perfected this appeal from that order. On motion of Gibbons a supersedeas was granted in this court, and his name was duly printed on the official ballot. In support of his appeal he has filed a brief citing authorities to the proposition that the matter in controversy is purely political and a court of equity would without jurisdiction for that reason.

Plaintiff has not filed any brief in support of the order. The primary election of April 10, 1934, has been held. It is apparent that any order or decree of this court cannot in any way affect the rights or interests of these parties. In other words, the questions arising on this record are purely moot questions which this court does not decide. Under these circumstances this court, following the precedent laid down in Lyle v. McKinlay, 229 Ill. App. 349, orders that the appeal be dismissed without costs against either party.

APPEAL DISMISSED.

O'Connor and McSurely, JJ., concur.

Plaintiff has not filed any brief in support of the order. The primary election of April 10, 1934, has been held. It is apparent that any order or decree of this court cannot in any way affect the rights or interests of these parties. In other words, the questions arising on this record are purely moot questions which this court does not decide. Under these circumstances this court, following the procedure laid down in Lyle v. Hopkins, 229 Ill. App. 340, orders that the appeal be dismissed without costs against either party.

APPEAL DISMISSED.

O'Connor and McCurdy, JJ., concur.

37546

IKE COPALMAN,

(Plaintiff) Appellee,

v.

MORRIS DUBOV, et al,

(Defendants).

On appeal of ANNE STRONGIN,

Appellant.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT,

COOK COUNTY.

275 I.A. 632

Opinion filed alone June 7, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The bill of complaint in this proceeding charges that Morris Dubov and Annie Dubov, his wife, executed their certain note and trust deed to premises in Cook County in the sum of $7,000; that said trust deed provided for the appointment of a receiver upon default of the principal or interest; charges that default has been made in the payment of interest on said loan and that the taxes are unpaid; that complainant is the legal holder of the principal note and that the premises are being permitted to deteriorate and the value has become diminished; that the premises are scant and insufficient security for the indebtedness and that a receiver should be appointed.

The bill of complaint is not sworn to. Notice of the application for a receiver was served on the defendants and upon hearing an order was entered appointing a receiver. From this order an interlocutory appeal was taken to this court.

The order recites:

> "Upon the complaint in chancery to foreclose being presented to the Court, and the Court being apprised therefrom that said trust deed herein sought to be foreclosed pledges all rents, etc., and it further appearing from said complaint in chancery that the premises are meager and scant security for said indebtedness secured by said trust deed, etc.

37546

IKE COPELMAN, (Plaintiff) Appellee,	INTERLOCUTORY APPEAL
v.	FROM CIRCUIT COURT,
MORRIS DUBOV, et al, (Defendants).	COOK COUNTY.
On appeal of ANNE STRONGIN, Appellant.	275 I.A. 639

Opinion filed June 7, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The bill of complaint in this proceeding charges that Morris Dubov and Annie Dubov, his wife, executed their certain note and trust deed to premises in Cook County in the sum of $7,000; that said trust deed provided for the appointment of a receiver upon default of the principal or interest; charges that default has been made in the payment of interest on said loan and that the taxes are unpaid; that complainant is the legal holder of the principal note and that the premises are being permitted to deteriorate and the value has become diminished; that the premises are scant and insufficient security for the indebtedness and that a receiver should be appointed.

The bill of complaint is not sworn to. Notice of the application for a receiver was served on the defendants and upon hearing an order was entered appointing a receiver. From this order an interlocutory appeal was taken to this court.

The order recites:

"Upon the complaint in chancery to foreclose being presented to the Court, and the Court being advised therefrom that said trust deed herein sought to be foreclosed pledges all rents, etc., and it further appearing from said complaint in chancery that the premises are meager and scant security for said indebtedness secured by said trust deed, etc.

"Wherefore, the Court having read the said complaint in chancery finds that there is good ground and cause for a receiver, etc."

No affidavits were filed in support of the bill of complaint and no evidence heard by the court in support of the motion. It is apparent from the record that the order appointing a receiver was based upon the unverified bill.

The court in the case of Daley v. Nelson, 119 Ill. App. 627, in its opinion, says:

"The power of a court of chancery to appoint a receiver in a proper case is undoubted, but the exercise of that power is a totally different proposition. A receiver is not usually appointed before answer unless fraud or some other strong ground to induce the court to act is presented and is clearly proved by affidavit. A petition for the appointment of a receiver must be verified. If the motion is based upon the allegations of the bill, that pleading must be sworn to. Baker v. Backus, 32 Ill. 115; Siegmund v. Ascher, 37 Ill. App. 122; 17 Ency. Pl. & Pr. pp. 736, 738, and notes."

Before the coming in of an answer the court should not appoint a receiver except after a sufficient showing and this should be based upon a verified bill, affidavits or evidence heard in open court. From the proceedings in this cause it appears that there was no evidence upon which the court could base the order. The bill being unverified, it should not be taken as true. We have held in this court that the pledge of the rents in the trust deed, while entitled to weight, is not alone sufficient to require the appointment of a receiver, but that the equities of the case should be considered by the chancellor. Frank v. Siegel, 263 Ill. App. 316.

For the reasons stated in this opinion the order of the Circuit Court appointing a receiver is reversed.

ORDER REVERSED.

HALL, P.J. AND HEBEL, J. CONCUR.

> "Wherefore, the Court having read the said complaint in chancery finds that there is good ground and cause for a receiver, etc."

No affidavits were filed in support of the bill of complaint and no evidence heard by the court in support of the motion. It is apparent from the record that the order appointing a receiver was based upon the unverified bill.

The court in the case of Daley v. Nelson, 119 Ill. App. 627, in its opinion, says:

> "The power of a court of chancery to appoint a receiver in a proper case is undoubted, but the exercise of that power is a totally different proposition. A receiver is not usually appointed before answer unless fraud or some other strong ground to induce the court to act is presented and is clearly proved by affidavit. A petition for the appointment of a receiver must be verified. If the motion is based upon the allegations of the bill, that pleading must be sworn to. Baker v. Beckus, 32 Ill. 118; Blaymund v. Wagner, 37 Ill. App. 132; 17 Enc. Pl. & Pr. pp. 756, 758, and notes."

Before the coming in of an answer the court should not appoint a receiver except after a sufficient showing and this should be based upon a verified bill, affidavits or evidence heard in open court. From the proceedings in this cause it appears that there was no evidence upon which the court could base the order. The bill being unverified, it should not be taken as true. We have held in this court that the pledge of the rents in the trust deed, while entitled to weight, is not alone sufficient to require the appointment of a receiver, but that the equities of the case should be considered by the chancellor. Frank v. Stengel, 285 Ill. App. 316.

For the reasons stated in this opinion the order of the Circuit Court appointing a receiver is reversed.

ORDER REVERSED.

HALL, P.J. AND HEBEL, J. CONCUR.

37218

43

CATHERINE M. KENNEDY, Administratrix of the Estate of Frederick R. Kennedy, Deceased,
Defendant in Error,

vs.

LINCOLN FUNERAL SYSTEM ASSOCIATION, a Corporation, and R. H. McGAVOCK,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

275 I.A. 632[4]

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

By this writ defendants in the trial court seek to reverse a judgment in favor of plaintiff for the sum of $400 entered upon the finding of the court. The action was of the fourth class in contract. Plaintiff in her statement of claim averred that defendants were indebted to her in the amount of the judgment under the terms of an industrial funeral or burial policy, No. 24250, issued to her deceased husband, Frederick R. Kennedy. The statement averred the death of Frederick R. Kennedy on October 11, 1932; that the premiums on the policy were not in arrears; that proof of death had been given to defendants who refused and failed "to perform a burial of the insured;" that plaintiff necessarily expended the sum demanded for burial of the deceased, and that defendants refused to pay the sum or any part thereof.

Defendants filed an affidavit of merits, denying that they were indebted on account of the policy, stating that they had no knowledge as to whether Frederick R. Kennedy was dead or alive and demanding strict proof in that respect. The affidavit also avers that the premiums on the policy were in arrears before October 11, 1932, and denies that any proof of death was given to defendants as alleged in plaintiff's statement of claim. Other alleged defenses are set up which we think it unnecessary to recite.

Plaintiff administratrix has not appeared in this court to support the judgment, which it is apparent must be reversed for the

GATHERINE M. KENNEDY, Administratrix of the Estate of Frederick R. Kennedy, Deceased, Defendant in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
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275 I.A. 632

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Plaintiff administratrix has not appeared in this court to support the judgment, which it is apparent must be reversed for the

reason that there is no proof whatever tending to show any liability upon the part of either defendant.

Certificate No. 24250, introduced in evidence by plaintiff, indicates that Lincoln Burial Association is a corporation organized under the laws of Illinois with a paid in capital of $50,000. It certifies that Frederick R. Kennedy is a member of the "Funeral Service System" and that in consideration of a weekly payment of 35¢ and in compliance with the conditions of the certificate and by-laws of the System, he is entitled to a $400 funeral as described. The certificate states:

> "It is agreed that the Lincoln Burial Association, a corporation organized and existing under and by virtue of the Laws of the State of Illinois, will furnish for the FUNERAL SERVICE SYSTEM, operating in compliance with the Act of the Legislature of the State of Illinois entitled 'An Act relating to Burial Insurance Societies' approved June 10, 1927, a funeral for the holder of this certificate, consisting of preservation of body, robe, couch or half-couch casket, equivalent to hearse and four cars, or one hearse, two funeral cars, grave box and grave, at the death of said holder of certificate.
>
> "Said member hereby agrees to the above named conditions as a part of the contract upon which said funeral benefits are to be furnished."

The certificate appears to have been issued March 25, 1929, and is executed, "Funeral Service System, R. H. McGavock, President, L. H. McGavock, Secretary."

The Funeral Service System by-laws appear upon the back of this certificate, and in type larger than that in which other parts of the by-laws are printed, is a notice that in case of death it is important that the home office of the Lincoln Burial Association be notified immediately. There is nothing in the certificate which indicates that R. H. McGavock is to be personally liable, nor does the evidence given at the trial tend to show any facts which would establish a personal liability on his part. This fact alone would under the law of this State require a reversal of the joint judgment, it having been uniformly held by the courts of this State since McDonald v. Wilkie, 13 Ill. 22, that where a judgment joint against

reason that there is no proof whatever tending to show any liability upon the part of either defendant.

Certificate No. 22290, introduced in evidence by plaintiff indicates that Lincoln Burial Association is a corporation organized under the laws of Illinois with a paid in capital of $50,000. It certifies that Frederick H. Kennedy is a member of the "Funeral Service System" and that in consideration of a weekly payment of 55¢ and in compliance with the conditions of the certificate and by-laws of the System, he is entitled to a $500 funeral as described. The certificate states:

> "It is agreed that the Lincoln Burial Association, a corporation organized and existing under and by virtue of the laws of the State of Illinois, will furnish for the FUNERAL SERVICE SYSTEM, operating in compliance with the Act of the Legislature of the State of Illinois entitled 'An Act relating to Burial Insurance Societies' approved June 16, 1927, a funeral for the holder of this certificate, consisting of preservation of body, robe, casket or half-a-set casket, equivalent to hearse and four cars, or one hearse, two funeral cars, grave box and grave, at the death of said holder of certificate.
>
> "Said member hereby agrees to the above named conditions as a part of the contract upon which said funeral benefits are to be furnished."

The certificate appears to have been issued March 28, 1929, and is signed, "Funeral Service System, H. H. Medavoy, President, L. H. Medavoy, Secretary."

The Funeral Service System by-laws appear upon the back of this certificate, and in type larger than just in which other parts of the by-laws are printed, is a notice that in case of death it is important that the home office of the Lincoln Burial Association be notified immediately. There is nothing in the certificate which indicates that H. H. Medavoy is to be personally liable, nor does the evidence given at the trial tend to show any facts which would establish a personal liability on his part. This fact alone would under the law of this State require a reversal of the joint judgment, it having been uniformly held by the courts of this state since Donald v. Illinois, 53 Ill. 197, that where a judgment joint against

two or more defendants is erroneous as to any one of them, it must be reversed as to all.

The corporation, however, further contends that the evidence fails to show any liability on its part. As already stated, the certificate is in evidence. The uncontradicted proof tends to show that Frederick R. Kennedy died October 11, 1932; that plaintiff arranged for his funeral and burial and that the Funeral Service System did not contribute any sum whatever in that respect. Plaintiff testified that she went to defendant's place of business and asked for the adjuster and was told that he was not in and that defendant did not owe anything. It was admitted that defendant corporation had not paid anything on the claim. On cross examination plaintiff said she first went to the office of defendant on the 17th or 18th (evidently meaning the 17th or 18th of October, 1932), for she adds that she never went to them before the funeral. She also said that she had never made a demand on defendant for the service or goods described in the certificate; that she never reported the death to defendant before the funeral, and that defendant never denied or refused to give a funeral as called for in the certificate. There is no proof of notice of death before burial. Upon the uncontradicted evidence it must be held that plaintiff was not entitled to recover.

The judgment is therefore reversed with a finding of facts and judgment entered in favor of defendants in this court.

REVERSED WITH A FINDING OF FACTS AND JUDGMENT HERE.

McSurely, J., concurs.

O'Connor, J., specially concurring: I agree with the conclusion reached but not with all that is said in the opinion.

(See next page.)

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The judgment is therefore reversed with a finding of facts and judgment entered in favor of defendants in this court.

REVERSED WITH A FINDING OF FACTS AND JUDGMENT ENTER.

McNally, J., concurs.

O'Connor, J., specially concurring: I agree with the conclusion reached but not with all that is said in the opinion.

(See next page.)

37218 FINDING OF FACTS.

We find as facts that there is no proof tending to show that either of the defendants is liable to plaintiff upon the alleged contract upon which she sues, and that judgment should be entered in this court in favor of defendants.

STATE FINDING OF FACTS.

We find as facts that there is no proof tending to show that either of the defendants is liable to plaintiff upon the alleged contract upon which the suit, and that judgment should be entered in this court in favor of defendants.

37319

HORATIA R. STOCKTON,
Defendant in Error,

vs.

CITY OF CHICAGO, a Municipal Corporation,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

44 A

275 I.A. 633

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is a writ of error by defendant City to reverse a judgment in the sum of $2500 entered upon the verdict of a jury in an action on the case for personal injuries, motions of defendant for a new trial and in arrest having been overruled.

The declaration averred that plaintiff on October 17, 1928, sustained injuries by reason of the negligence of defendant City, in that it permitted a break or hole to remain in the street pavement on the public highway in front of No. 6220 Cottage Grove avenue, in the city of Chicago, without any warning signs; that defendant knew or ought to have known of the defective condition of the street, and that plaintiff, while crossing the street with due care for her own safety, fell into the hole breaking both her ankles and otherwise severely injuring herself. The declaration alleged due notice was served on defendant City on April 16, 1929. The written notice was set up verbatim. Defendant filed a plea of the general issue and a plea of non-ownership.

There is no contention here that defendant was not negligent or that plaintiff was guilty of contributory negligence, or that she was not injured under the circumstances alleged in her declaration, but defendant earnestly contends that the judgment should be reversed because of the alleged failure of plaintiff to prove the facts as stated in the notice served upon the City. It is contended that for this reason a request of defendant made at the close of all

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There is no contention here that defendant was not negligent or that plaintiff was guilty of contributory negligence, or that she was not injured under the circumstances alleged in her declaration, but defendant earnestly contends that the judgment should be reversed because of the alleged failure of plaintiff to prove the facts as stated in the notice served upon the City. It is contended that for this reason a request of defendant made at the close of all

the evidence for an instructed verdict in its favor should have been given, and further that the court erred in an instruction given to the jury in that the instruction while mandatory in form did not state in detail essential facts which the statute provides should be contained in the notice given in such case. Paragraph 7, section 2, chapter 70 (Smith-Hurd's Ill. Rev. Stats. 1933) directs that any person about to bring an action of this kind against city, village or town shall "either by himself, agent or attorney, file in the office of the city attorney (if there is a city attorney, and also in the office of the city clerk) a statement in writing, signed by such person, his agent or attorney, giving the name of the person to whom such cause of action has accrued, the name and residence of person injured, the date and about the hour of the accident, the place or location where such accident occurred and the name and address of the attending physician (if any)."

Nearly all the cases of the Supreme and Appellate courts of this State construing this section of the statute are cited in the briefs. Defendant says that the statute is mandatory and creates a condition precedent to the right to bring suit; that plaintiff must aver and prove the notice, and that otherwise the cause of action cannot be sustained. It cites Erford v. City of Peoria, 229 Ill. 546; Walters v. City of Ottawa, 240 Ill. 259; Guimette v. City of Chicago, 242 Ill. 501; Langguth v. Village of Glencoe, 253 Ill. 505; Swenson v. City of Aurora, 196 Ill. App. 83; Village of Dawson v. Estrop, 243 Ill. App. 552; and Frey v. City of Chicago, 246 Ill. App. 174, reversed in 330 Ill. 640; Condon v. City of Chicago, 249 Ill. 596, is also cited to the proposition that a plea of the general issue by defendant requires plaintiff to prove the notice as alleged in the declaration.

There is no question that these cases sustain the general proposition of law as stated and hold that the question of whether

the evidence for an instructed verdict in its favor should have been given, and further that the court erred in an instruction given to the jury in that the instruction while mandatory in form did not state in detail essential facts which the statute provides should be contained in the notice given in such case. Paragraph 7, section 2, chapter 70 (Smith-Hurd's Ill. Ann. Stats. 1933) directs that any person about to bring an action of this kind against city, village or town shall "either by himself, agent or attorney, file in the office of the city attorney (if there is a city attorney, and also in the office of the city clerk) a statement in writing, signed by such person, his agent or attorney, giving the name of the person to whom such cause of action has accrued, the name and residence of person injured, the date and about the hour of the accident, the place or location where such accident occurred and the name and address of the attending physician (if any)."

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There is no question that these cases sustain the general proposition of law as stated and hold that the question of whether

there has been proof of notice may be raised by a motion for an instruction in defendant's favor at the close of all the evidence. Defendant in its reply brief has also cited a large number of cases from other jurisdictions which we do not deem necessary to discuss, since the language of the Illinois statute as construed by the Illinois courts is controlling.

The facts disclosed by the record here are that the declaration set up verbatim a notice, the sufficiency of which is not challenged, and that upon the trial proof was made of the execution of this notice by plaintiff and due service of the same upon the proper officials of the City. Plaintiff did not offer further proof as to the truth of the precise facts stated in the notice. Plaintiff seems to have taken the position that having proved the due execution of the notice and its service upon defendant, this was prima facie sufficient to show compliance with the provisions of the statute. No evidence to the contrary was offered by defendant. The notice alleged in the declaration and received in evidence states: "The name and address of my attending physicians are Dr. E. S. Stewart and Fred W. Moeller, both at 826 E. 61st Street, Chicago, Illinois." Dr. Stewart when called as a witness at the trial in response to a question as to where he lived, replied, "6751 Cornell avenue," and as a matter of fact there is no proof whatever in the record as to the residence of Dr. Fred W. Moeller. The notice states the address of both Doctors Stewart and Moeller to be 826 E. 61st street. In other words, the record, other than as indicated by the introduction of the written notice in evidence, does not disclose anything whatever as to the address of either of the attending physicians at the time the injury occurred. The contention of defendant is that it was essential to plaintiff's case that she make such proof. Her contention is that by proof of the service of the notice, which notice was as alleged in her declaration, she met this

there has been proof of notice may be raised by a motion for an instruction to defendant's favor at the close of all the evidence. Defendant in its reply brief has also cited a large number of cases from other jurisdictions which we do not deem necessary to discuss, since the language of the Illinois statute as construed by the Illinois courts is controlling.

The facts disclosed by the record herein are that the destruction set up with the notice, the sufficiency of which is not challenged, had lost upon the trial after the date of the execution of this notice by plaintiff and the service of the same upon the proper officials of the city. Plaintiff did not offer further proof as to the truth of the specific facts stated in the notice. Plaintiff seems to have taken the position that having proved the due execution of the notice and its service upon defendant, this was <u>prima facie</u> sufficient to show compliance with the provisions of the statute. No evidence in the record was introduced by defendant. The notice relied on is the conclusion and reliance in evidence states: "The name and address of my attending physicians are Dr. G. G. Stewart and Dr. F. [illegible], [illegible] . [illegible] Street, Chicago, Illinois." [illegible] stated as a reason at the trial in response to a question by the trial court, [illegible], "Well Counsel [illegible]," and as a reason at that time in no proof whatever in the record as to [illegible] the [illegible] . [illegible] . The notice states the address of the doctor [illegible] was [illegible] to be [illegible] other street. In other words, [illegible], other than as implanted by the intervention of the writer, [illegible] [illegible] [illegible] physicians at the time the injury occurred. The contention of defendant is that it was prejudicial to plaintiff [illegible] not [illegible] much proof. Her contention is that by reason of the service of the notice, which notice was as stated in her declaration, and set this

burden of proof; that the proof is prima facie sufficient and, in the absence of any proof from which a jury could reasonably find to the contrary, must be regarded as established. This court is committed to the construction of the statute for which plaintiff contends. Thus in Hazzard v. City of Chicago, 259 Ill. App. 166, where defendant contended that there was no proof of the facts alleged in the notice, although it was not denied that the notice as set up in the declaration was in fact served, this court said:

"No complaint is made as to the sufficiency of the notice or that it was not served upon the proper city officials, nor is there any contention that any of the information given in the notice was contrary to the evidence in any particular. The notice being in proper form and having been properly served, plaintiff, by introducing it in evidence and by making out her case on the merits by other evidence, made out a prima facie case. It was not necessary that she prove by evidence on the trial that the matters contained in the notice as to names and addresses of the attending physicians were as stated in the notice. If such evidence has been offered and it did not conform to the facts stated in the notice, defendant's contention might be valid as held in the authorities cited by defendant's counsel. But there was no variance between the proof offered and the notice, and we hold that it was unnecessary for plaintiff, in the instant case, to prove the names and addresses of the physicians. It has often been stated by the Supreme court and by this court, that the purpose of the statute requiring notice was to give the municipality information to enable it to investigate the merits of a claim made by a person against the municipality and to properly defend an action in case suit were brought. In the instant case the information was given by the serving of the notice and no complaint is made that such information was inaccurate. The statute was complied with."

The opinion in that case was filed November 3, 1930, and while the cases were not reviewed in detail, an examination of the briefs filed in behalf of the City of Chicago shows that practically all the Illinois cases now cited were also cited there.

In the still later case of Graham v. City of Chicago, 260 Ill. App. 590, it was again argued in behalf of the City that the plaintiff had failed to prove the contents of the statutory notice served upon it. There the notice contained the statement that the attending physician was "Dr. Edwin Brucker, 4100 W. Madison Street, Chicago, Illinois." It appeared that when the plaintiff was injured on the street some of the neighbors called a doctor but his name was

burden of proof; that the proof is prima facie sufficient and, in the absence of any proof from which a jury could reasonably find to the contrary, must be regarded as satisfactory. This court is committed to the constitution of the statute for which plaintiff contends. Thus in Hazard v. City of Chicago, 259 Ill. App. 166, where defendant contended that there was no proof of the facts alleged in the notice, although it was not [illegible] the notice as set up in the declaration was in fact served, this court said:

> "No complaint is made as to the form of the notice or that it was not served upon the proper city official, nor is there any contention that any of the information from in the notice was contrary to the evidence in any particular. The notice being in proper form and served upon proper party, it, in fact, by introducing it in evidence was by mailing out for case on the merits by other evidence, made out a prima facie case. It was not necessary that the proof by evidence on the trial that the matters contained in the notice be in exact accordance of the allegations of the pleadings were strictly in the notice. If such evidence has been offered and it did not conform to the facts stated in the notice, defendant's contention might be valid as held in the contention offered by defendant's counsel. But there was no variance between the proof offered and the notice, and we hold that if was sufficiency for plaintiff, in the instant case, to prove the essential averments of the pleadings. It has often been stated by the Supreme court and by this court, that the purpose of the statute requiring notice was to give the municipality information to enable it to investigate the merits of a claim made by a person against the municipality and to promptly relieve an action in case such proof. In the instant case the information was given by the serving of the notice and no complaint is made that such information was inaccurate. The statute was complied with."

The opinion in that case was filed November 3, 1926, and while the cases were not reviewed in terms, an examination of the briefs filed in behalf of the city of Chicago shows that practically all the Illinois cases now cited were also cited there.

In the still later case of Wagner v. City of Chicago, 350 Ill. App. 300, it was again argued in behalf of the city that the plaintiff had failed to prove the contents of the [illegible] notice served upon it. There the notice contained the [illegible] that the attending physician was "Dr. [illegible] Chicago, Illinois." It appeared that when the plaintiff was injured on the street some of the negligent driver's [illegible] at his home was

not given by any witness. The plaintiff was taken the next day to the County hospital where she was under the care of a Dr. Steinberg and a Dr. Kronenberg. The defendant contended on the authority of Hamilton Co. v. Channel Chemical Co., 327 Ill. 362, that since the notice named Dr. Brucker as the attending physician and the plaintiff did not prove that he had attended her, the proof failed to make out the case stated in the declaration. This court said:

"This is manifestly not applicable to the instant case. In Frey v. City of Chicago, 330 Ill. 640, whether the plaintiff's place of residence and the physician's address were correctly given in the notice, were controverted questions of fact, to determine which evidence was necessary.

Here, there was no controversy as to anything contained in the notice nor as to the extent of plaintiff's injuries nor the medical treatment given her. At most there was a variance between the statement in the notice as to the attending physician and the evidence. Defendant did not raise the point upon the trial. Under such circumstances the rule is that, not having raised the point in the trial court, it is too late to raise it upon review; that advantage may be taken of a variance upon appeal, it must appear that it was specifically pointed out in the trial court. City of Waukegan v. Sharafinski, 135 Ill. App. 436; Chicago, B. & Q. R. Co. v. Dickson, 143 Ill. 368."

This case was affirmed by the Supreme court in Graham v. City of Chicago, 346 Ill. 638. The opinion of the Supreme court stated:

"It is contended that the plaintiff ought not recover because there was no proof that she was ever attended by 'Dr. Edwin Brucker, 4100 West Madison street, Chicago, Illinois,' or that his name and address were correctly stated in the statutory notice of claim. The statute requires the plaintiff in a case of this character to serve a notice of his claim upon a municipality as a condition precedent to a right to bring an action. The statute is mandatory. Such a notice was served. The plaintiff averred it in her declaration and proved it upon the trial. The statute does not require a plaintiff to furnish proof of each and every matter set out in the notice. It is apparent that if the notice specified a date of the accident and a different date therefor was shown by the evidence the notice would not be in compliance with the requirements of the statute and a suit to dismiss on that ground would be allowed, but if there is nothing in the proof to contradict the recitals of the notice, or if there is nothing to show that a recital is untrue, there is no ground for a motion to dismiss. The statute provides that the notice must be given and the rules of practice require that proof of service of the notice shall be made upon the trial. In this case a copy of the notice was introduced in evidence and proof was made of its service. Nothing appeared in the evidence to contradict any recital. No effort was made to show that Dr. Brucker was the attending physician or that his address was correctly stated in the notice. There is no proof at all in the record concerning

not given by any witness. The plaintiff was taken the next day to the County Hospital where she was under the care of a Dr. Stein-berg and a Dr. Kronenberg. The defendant contended on the authority of Hamilton Co. v. General Chemical Co., 227 Ill. 328, that since the notice named Dr. Kramer as the attending physician and the plaintiff did not prove that he had attended her, the proof failed to make out the case stated in the declaration. This court said:

"This is manifestly not applicable to the instant case. In Kerr v. City of Chicago, 246 Ill. 64, whether the plaintiff's place of residence and the physicians's address were correctly given in the notice, were controverted questions of fact, to determine which evidence was necessary.

Here, there was no controversy as to anything contained in the notice nor as to the extent of plaintiff's injuries nor the medical treatment given her. At most there was a variance between the statement in the notice as to the attending physician and the evidence. Defendant did not raise the point upon the trial. Under such circumstances the rule is that, not having raised the point in the trial court, it is too late to raise it upon review; that advantage may be taken of a variance upon appeal, it must appear that it was specifically pointed out in the trial court. City of Danville v. Shepherd, 143 Ill. 424; Chicago, R. I. & P. R. R. Co. v. Dickson, 143 Ill. 368."

This case was affirmed by the supreme court. In Graham v. City of Chicago, 246 Ill. 626. The opinion of the supreme court stated:

"It is contended that the plaintiff ought not recover because there was no proof that she was ever attended by 'Dr. Ophelia Kruckser, 4140 West Madison street, Chicago, Illinois,' or that the name and address were correctly stated in the statutory notice of claim. The statute requires the claimant in a case of this character to serve a notice of his claim upon a municipality as a condition precedent to a right to bring an action. The statute is mandatory. Such a notice was served. The plaintiff averred in her declaration and proved it upon the trial. The statute does not require a plaintiff to furnish proof of each and every matter set out in the notice. It is sufficient that if the notice contained a claim of the nature and a bill of items on that account was sworn by the evidence the notice would not be in compliance with the requirements of the statute and a suit to finalize on that account would be allowed, but if there is nothing in the proof to contradict the recitals of the notice, or if there is nothing to show that a recital is untrue, there is no ground for a motion to dismiss. The statute provides that the notice must be signed and the rules of procedure require that proof of service of the notice shall be made for the trial. In this case a copy of the notice was introduced in evidence and proof was made of its service. Nothing appeared in the evidence to contradict any recital. No effort was made to show that Dr. Kruckser was the attending physician or that his address was correctly stated in the notice. There is no proof at all in the record concerning

these matters, and we see no good reason why the plaintiff should be required to make affirmative proof of the truth of recitals of this character unless they are challenged and put in issue. However, the notice which was offered in evidence stated upon its face that Dr. Brucker was the attending physician and gave his address. No objection was raised by the defendant because of the lack of positive proof and the court's attention was never called to it.

Counsel for the City claim that proof of these matters was made necessary by a plea of the general issue, and cite Condon v. City of Chicago, 249 Ill. 596. The cited case does not hold that a plea of the general issue requires proof of all matters set up in the notice. It simply holds that the giving of a notice is an essential part of the right of action and that a plea of the general issue necessitates proof that the notice was given. The giving of the notice, and not its contents, is what a general traverse puts in issue."

The purpose of the statute is to protect cities from unwarranted and unjust claims made against them and to enable them to prepare a proper defense in all cases. The statute should be construed so as to assist in the purpose for which it was enacted and should not be used as a means of entrapping an honest plaintiff. The statute does not require the residence of the physician to be given. It directs that his address shall be stated in the notice. The proof of service having been made, the notice itself was prima facie evidence as to the truthfulness of the facts therein narrated. There is not a scintilla of evidence in this record tending to show that there was any misstatement whatsoever as to any fact of which plaintiff was required to give notice to defendant. For the reasons stated the court did not err in denying the motion of defendant at the close of all the evidence for an instructed verdictin its favor.

Of the same nature is defendant's further contention that the court erred in giving plaintiff's instruction No. 2. This instruction directed a verdict, and after stating other necessary elements of plaintiff's cause of action, in substance stated that if the jury should further find that plaintiff within six months after the accident caused the notice to be served upon defendant "in accordance with the statute, then you are instructed that you should find the defendant guilty." It is urged that this instruction was defective in that it failed to set out in detail the material facts which the

statute directed that the notice should contain. There might be merit in this contention if the facts in this regard had been controverted. As we have already seen, the proof by plaintiff of compliance with the statute is uncontradicted. The court would have been justified in telling the jury that so far as the giving of notice was concerned plaintiff had complied with the statute. There was therefore no error in the instruction.

Defendant also contends that the instruction was insufficient because it failed to allege, as is usual in such pleadings, that a duty was cast upon defendant. While that usual conclusion was not alleged, the declaration did set up the facts from which this conclusion was a necessary inference, and this was sufficient. Ayers v. City of Chicago, 111 Ill. 100; Griffin v. Chicago, 150 Ill. 334; Chicago & A. R. R. v. Quinn, 173 Ill. 138; Larson v. Wetherell, 79 Ill. App. 32. Indeed, the cases cited by defendant to this point are in accord with this statement of the law. Chicago Union Traction Co. v. Giles, 179 Ill. 290; Bayway v. City Elevator Co., 251 Ill. 28; McGuire v. Connecticut Gen. Life Ins. Co., 303 Ill. 89.

The contentions of defendant city are without merit, and the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor and Scanlan, JJ., concur.

37269

CAROLINE CROSS,
Defendant in Error,

vs.

WILLIAM C. GASCON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

45 H

275 I.A. 633

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover money which she alleged she had loaned to defendant, and upon trial by a jury had judgment for $944.15, which defendant seeks to have reversed.

Defendant first says that the verdict is contrary to the evidence. Plaintiff and defendant had worked together in various factories and had been upon friendly terms for a long period of time; at the time when plaintiff says she loaned defendant money they were fellow employees of a printing concern in Chicago; plaintiff's name at that time was Caroline Specht; she subsequently married a Mr. Cross. Defendant and his son bought from a dealer in Woodstock two automobiles which required a cash payment from him of $1700; $700 of this was paid August 8, 1927.

Plaintiff testified that on August 13th defendant told her that he wanted to buy a new automobile, and as he did not have sufficient money asked her if she would lend it to him, promising her 6% interest. Plaintiff and defendant had separate accounts in the Broadway Trust & Savings Bank, and they went together to this bank and drew out their savings accounts; plaintiff drew out $846 and a few cents and says that she gave to defendant $846, retaining the odd cents. Defendant drew out $377.63, which was the entire amount of his deposit. Defendant concedes that on this occasion plaintiff withdrew her money from the Broadway bank, but testified that she said she wished to deposit it in another bank, and that he took her to the other bank for that purpose. He denies that plaintiff

37269

CAROLINE CROSS,
Defendant in Error,

vs.

WILLIAM C. GARCOW,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

275 I.A. 633

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover money which she alleged she had loaned to defendant, and upon trial by a jury had judgment for $924.12, which defendant seeks to have reversed.

Defendant first says that the verdict is contrary to the evidence. Plaintiff and defendant had worked together in various factories and had been upon friendly terms for a long period of time; at the time when plaintiff says she loaned defendant money they were fellow employees of a printing concern in Chicago; plaintiff's name at that time was Caroline Cpeckt; she subsequently married a Mr. Cross. Defendant and his son bought from a dealer in Woodstock two automobiles which required a cash payment from him of $1700; $700 of this was paid August 6, 1927.

Plaintiff testified that on August 15th defendant told her that he wanted to buy a new automobile, and as he did not have sufficient money asked her if she would lend it to him, promising her 6% interest. Plaintiff and defendant had separate accounts in the Broadway Trust & Savings Bank, and they went together to this bank and drew out their savings accounts; plaintiff drew out $840 and a few cents and says that she gave to defendant $846, retaining the odd cents. Defendant drew out $327.65, which was the entire amount of his deposit. Defendant concedes that on this occasion plaintiff withdrew her money from the Broadway bank, but testified that she said she wished to deposit it in another bank, and that he took her to the other bank for that purpose. He denies that plaintiff

loaned him this money. There is no evidence that plaintiff made such a deposit in another bank. She says that a few days thereafter defendant gave her a memorandum in writing dated "8-13-27," containing the words, "Caroline Specht, due $846.00", She testified that at intervals thereafter he made three payments of $50 each, and each time marked the payment upon the memorandum; that all the writing and figures on the memorandum were made by the defendant. This writing was introduced in evidence.

Defendant denies making this memorandum, or that any of the writing thereon is his. Plaintiff introduced two other writings admittedly containing handwriting of defendant. One was the receipt or voucher drawn by defendant when he withdrew his savings account from the Broadway bank on August 13th, the other the signature card made by defendant when he opened his account at that bank. The jury had the opportunity to compare defendant's writing on these papers with the writing and figures on the memorandum which plaintiff says defendant gave her. Photostatic copies of the memorandum and these papers are in the record before us, and comparison of the same leads to the conclusion that the jury was justified in believing all were made by the same person - the defendant.

Although plaintiff's version is contradicted in some unimportant particulars, yet the jury could properly find that she made the loan to defendant as she testified.

Complaint is made of the rulings of the trial court on the attempt of counsel for defendant to impeach the testimony of the plaintiff. There had been a previous trial of this cause and defendant wished to show that upon the prior trial plaintiff had testified that she had loaned defendant altogether about $150. Proper questions tending to show that she had so testified were admissible as tending to impeach her testimony in the second trial as to lending defendant $846. However, defendant did not

loaned him this money. There is no evidence that plaintiff made such a deposit in another bank. She says that a few days thereafter defendant gave her a memorandum in writing dated "8-13-27," containing the words, "Coralina Spaeth, due $646.00". She testified that at intervals thereafter he made three payments of $20 each, and each time marked the payment upon the memorandum; that all the writing and figures on the memorandum were made by the defendant. This writing was introduced in evidence.

Defendant denies making this memorandum, or that any of the writing thereon is his. Plaintiff introduced two other writings admittedly containing handwriting of defendant. One was the receipt or voucher drawn by defendant when he withdrew his savings account from the Broadway bank on August 13th, the other the signature card made by defendant when he opened his account at that bank. The jury had the opportunity to compare defendant's writing on these papers with the writing and figures on the memorandum which plaintiff says defendant gave her. Photostatic copies of the memorandum and these papers are in the record before us, and comparison of the same leads to the conclusion that the jury was justified in believing all were made by the same person - the defendant.

Although plaintiff's version is contradicted in some unimportant particulars, yet the jury could properly find that she made the loan to defendant as she testified.

Complaint is made of the rulings of the trial court on the attempt of counsel for defendant to impeach the testimony of the plaintiff. There had been a previous trial of this cause and defendant wished to show that upon the prior trial plaintiff had testified that she had loaned defendant altogether about $150. Proper questions tending to show that she had so testified were admissible as tending to impeach her testimony in the second trial as to loaning defendant $646. However, defendant did not

confine himself to these questions but sought to introduce the stenographic report of the extended colloquy between the plaintiff and the former trial judge. Examination of this colloquy clearly shows that both the trial court and the plaintiff were confused and the trial court expressed impatience with the plaintiff, using language tending to humiliate her, such as, "Don't you understand English?" and, "We will be playing around with this case three weeks if this lady doesn't make up her mind." Such comments obviously had no place in the second trial. Counsel for plaintiff suggests that the purpose of the offer was not so much to impeach the witness as to bring before the jury the obvious confusion on the former trial and the sharp remarks of the trial court on that trial, thus tending to prejudice the plaintiff on the present trial. Such an offer of proof was rightfully rejected by the court.

Upon the trial counsel for plaintiff asked defendant, who was testifying, to write the name "Caroline Specht" on a piece of paper. His counsel objected, and defendant indicated an unwillingness to do this. In his argument to the jury plaintiff's attorney commented upon this refusal of defendant to write plaintiff's name so that the jury might compare this with the name appearing upon the memorandum which plaintiff says defendant gave her. Counsel could properly comment upon this refusal and there was nothing objectionable in what he said. Other suggestions are made as to improper argument, but nothing said was prejudicial.

Defendant says that the statement of claim and affidavit were for $903.56, whereas the verdict and judgment were for $944.15. A witness for plaintiff testified as to the interest due on the unpaid principal, and the verdict and judgment took this into account. We are not disposed to disturb the amount of the judgment. No objection was raised in the court below as to the verdict and judgment, and the point is made in this court for the

confine himself to these questions but sought to introduce the stenographic report of the extended colloquy between the plaintiff and the former trial judge. Examination of this colloquy clearly shows that both the trial court and the plaintiff were confused and the trial court expressed impatience with the plaintiff, using language tending to humiliate her, such as, "Don't you understand Kingfish?" and, "We will be playing around with this case three weeks if this lady doesn't make up her mind." Such comments obviously had no place in the second trial. Counsel for plaintiff suggests that the purpose of the offer was not so much to impeach the witness as to bring before the jury the obvious confusion on the former trial and the sharp remarks of the trial court on that trial, thus tending to prejudice the plaintiff on the present trial. Such an offer of proof was rightfully rejected by the court.

Upon the trial counsel for plaintiff asked defendant, who was testifying, to write the name "Caroline Essom" on a piece of paper. His counsel objected, and defendant indicated an unwillingness to do this. In his argument to the jury plaintiff's attorney commented upon this refusal of defendant to write plaintiff's name so that the jury might compare this with the name appearing upon the memorandum which plaintiff says defendant gave her. Counsel could properly comment upon this refusal. As there was nothing objectionable in what he said. Other suggestions are made as to improper argument, but nothing said was prejudicial.

Defendant says that the statement of claim and affidavit were for $603.80, whereas the verdict and judgment were for $644.15. A witness for plaintiff testified as to the interest due on the unpaid principal, and the verdict and judgment took this into account. We are not disposed to disturb the amount of the judgment. No objection was raised in the court below as to the verdict and judgment, and the point is made in this court for the

first time. The statement of claim alleged that defendant had promised to pay 6% interest per annum on the original sum, and interest was figured to the date the statement was filed in court. Manifestly the interest continued thereafter and plaintiff was entitled to interest to the date of the trial.

The jury was justified in its conclusion, and as there were no reversible errors upon the trial the judgment is affirmed.

AFFIRMED.

Matchett, P. J., concurs.

O'Connor, J., specially concurring: I agree with the conclusion reached in the opinion of the court but not with all that is said concerning defendant's endeavor to impeach the plaintiff by showing what took place on the former trial.

first time. The statement of claim alleged that defendant had promised to pay 6% interest per annum on the original sum, and interest was figured to the date the statement was filed in court. Manifestly the interest continued thereafter and plaintiff was entitled to interest to the date of the trial.

The jury was justified in its conclusion, and so there were no reversible errors upon the trial; the judgment is affirmed.

AFFIRMED.

Matchett, P. J., concurs.

O'Connor, J., specially concurring: I agree with the conclusion reached in the opinion of the court but not with all that is said concerning defendant's endeavor to impeach the plaintiff by showing what took place on the former trial.

37467

BYRON F. VERDUNG,
Appellee,

vs.

FRANK BOBRYTZKE and JOSEPH F. CLARK,
CIVIL SERVICE BOARD OF LINCOLN PARK
CIVIL SERVICE COMMISSION,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

275 I.A. 633

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior court quashing the record and proceedings of the Civil Service Commission of Lincoln Park.

A writ of certiorari had issued to the Commission, to which a return was made; it charges that the petitioner, Byron F. Verdung, was employed as a patrolman by the Commissioners of Lincoln Park; that he was ordered by his superior officer, Captain Sammis, Jr., commanding officer of the Police Department of Lincoln Park, to report for certain police duty on April 17, 1933; that petitioner did not do so, but absented himself without permission of his superior officer and thereafter was for days absent without permission; that on April 22, 1933, petitioner was suspended from duty and charges were preferred against him, of which he was notified, and a hearing was had May 9, 1933; that the sworn testimony of witnesses was heard, both for petitioner and respondents, petitioner was found guilty, and it was ordered that he be removed and discharged from the position of patrolman in the classified service of Lincoln Park.

In Carroll v. Houston, 341 Ill. 531, the proper practice in such cases is stated at some length. It holds that the reviewing court has no power to pass upon the conclusion of the inferior tribunal but may examine the proceedings to determine whether the inferior tribunal had jurisdiction, and the facts upon which jurisdiction is founded must appear in the record, which also must show

37407

BYRON F. VERDUNG,
Appellee,

vs.

FRANK KOBRYTNEK and JOSEPH F. CLARK,
CIVIL SERVICE BOARD OF LINCOLN PARK
CIVIL SERVICE COMMISSION,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

275 I.A. 633

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the superior court quashing the record and proceedings of the Civil Service Commission of Lincoln Park.

A writ of certiorari had issued to the Commission, to which a return was made; it charges that the petitioner, Byron F. Verdung, was employed as a patrolman by the Commissioners of Lincoln Park; that he was ordered by his superior officer, Captain Sawyer, Jr., commanding officer of the Police Department of Lincoln Park, to report for certain police duty on April 17, 1932; that petitioner did not do so, but absented himself without permission of his superior officer and thereafter was for days absent without permission; that on April 22, 1932, petitioner was suspended from duty and charges were preferred against him, of which he was notified, and a hearing was had May 9, 1932; that the sworn testimony of witnesses was heard, both for petitioner and respondents, petitioner was found guilty, and it was ordered that he be removed and discharged from the position of patrolman in the classified service of Lincoln Park.

In Carroll v. Counsen, 341 Ill. 551, the proper practice in such cases is stated at some length. It holds that the reviewing court has no power to pass upon the conclusion of the inferior tribunal but may examine the proceedings to determine whether the inferior tribunal had jurisdiction, and the facts upon which jurisdiction is founded must appear in the record, which also must show

that the inferior tribunal had jurisdiction to hear and determine the case and that it proceeded legally.

In the instant case the record shows that the Civil Service Commissioners had jurisdiction, that charges were made, proper notice was given and a hearing had at which evidence for both parties was heard. The record presented would require the reversal of the order of the Superior court, which quashed the proceedings, if the finding of the Commission was sufficient. The finding does not specify the charges, and concludes, "We do further find that said charges as filed by Captain James U. Summis, Jr., against Patrolman Byron F. Verdung, were proved, and we find him guilty of the same." In Funkhouser v. Coffin, 301 Ill. 257, it was held that such a finding is a mere conclusion of law; that the finding must state the offenses which the officer was found guilty of committing.

In Hopkins v. Ames, 344 Ill. 527, cited by respondents, Hopkins was found guilty of violations of certain specific rules and guilty of certain specific offenses, all set out in detail in the finding. And in the Carroll case, supra, the court said that the judgment in the Funkhouser case was reversed because the finding of the Commission merely found the defendant guilty as charged, which was a mere conclusion. The findings in the Carroll case were full and complete, going into detail as to when, how, and under what circumstances Carroll was guilty.

In the recent case in this court, Wittey v. Newman et al., No. 37130, opinion filed March 5, 1934, we had occasion to pass upon the sufficiency of the finding that the petitioner was "guilty as charged," and under the rule announced in the Funkhouser case we held that it was insufficient, and the cause was remanded with directions to quash the record of the proceedings.

The above cited cases establish the rule that the findings must be full and complete, giving details with dates of the offenses

that the inferior tribunal had jurisdiction to hear and determine the case and that it proceeded legally.

In the instant case the record shows that the Civil Service Commissioners had jurisdiction, that charges were made, proper notice was given and a hearing had at which evidence for both parties was heard. The record presented would require the reversal of the order of the Superior court, which quashed the proceedings, if the finding of the Commission was arbitrary. The finding does not specify the charges, and concludes, "We do further find that said charges as filed by Captain James D. Lewis, Jr., against Patrolman Byron K. Verdun, were proved, and we find him guilty of the same." In Funkhouser v. Griffin, 181 III. 297, it was held that such a finding is a mere conclusion of law; that the finding must state the offenses which the officer was found guilty of committing.

In Hopkins v. Kane, 344 III. 7, cited by respondents, Hopkins was found guilty of violations of certain specific rules and guilty of certain specific offenses, all set out in detail in the finding. And in the Carroll case, supra, the court said that the judgment in the Funkhouser case was reversed because the finding of the Commission merely found the defendant guilty as charged, which was a mere conclusion. The findings in the Carroll case were full and complete, going into detail by so doing, how, and under what circumstances certain rules applied.

In the recent case in this court, Whitney v. Person et al., No. 37170, opinion filed June 7, 1964, we also concluded to case upon the sufficiency of the finding that the petitioner was "guilty as charged," and under the rule announced in the Funkhouser case we held that it was insufficient, and the cause was remanded with directions to quash the record of the proceedings.

The above cited cases establish the rule that the findings must be full and complete, listing totally with dates of the offenses

of which petitioner is found guilty.

It follows, therefore, that the order of the Superior court quashing the return and the proceedings of the Civil Service Commission was proper, and it is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

of which petitioner is found guilty.

It follows, therefore, that the order of the Superior Court quashing the return and the proceedings of the Civil Service Commission was proper, and it is affirmed.

AFFIRMED.

Matthews, P. J., and O'Connor, J., concur.

37360

LANGLEY & CO., INC., a Corporation,
Appellee,

vs.

HALSEY, STUART & CO., INC., a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

275 I.A. 633[4]

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendant to recover $50,000 claimed to be due it as "finder's commission" for services performed in making a contact between defendant and the Hotel LaSalle Company, whereby defendant purchased bonds of the hotel company of the par value of $5,000,000. The defendant denied any liability. There was a jury trial and a verdict and judgment in plaintiff's favor for $1,000, and the defendant appeals.

The original declaration composed of the common counts was filed December 13, 1924. January 31, 1928, plaintiff filed two additional, special counts in which it alleged that plaintiff was in the brokerage business and defendant in the investment banking business; that plaintiff learned the Hotel LaSalle was about to float a $5,000,000 bond issue and communicated the information to defendant; that defendant acted upon the information, entered into negotiations with the hotel company, and a few days later defendant, together with another investment house, purchased the $5,000,000 bonds. It was further allegged that there was a general and uniform custom and usage among investment bankers and brokers to pay a commission known as a "finder's commission" of 1% of the face of the bonds to the person furnishing information resulting in the purchase of the bonds.

In the second additional count it was alleged that plaintiff was employed by defendant to make a contact between the defendant and the hotel company. Defendant denied that it employed plaintiff; further denied that the contact alleged to have been

37360

LANGLEY & CO., INC., a Corporation,
Appellee,

vs.

HALSEY, STUART & CO., INC., a
Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

2Y5 I.A. 633

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendant to recover $50,000 claimed to be due it as "finder's commission" for services performed in making a contract between defendant and the Hotel Lasalle Company, whereby defendant purchased bonds of the hotel company of the par value of $3,000,000. The defendant denied any liability. There was a jury trial and a verdict and judgment in plaintiff's favor for $1,000, and the defendant appeals.

The original declaration comprised of the common counts was filed December 12, 1928. January 31, 1929, plaintiff filed two additional special counts in which it alleged that plaintiff was in the brokerage business and was a dealer in the investment banking business; that plaintiff learned the Hotel Lasalle was about to float a $3,000,000 bond issue and communicated the information to defendant; that defendant acted upon the information, entered into negotiations with the hotel company, and a few days later defendant, together with another investment house, purchased the $3,000,000 bonds. It was further alleged that there was a general and uniform custom and usage among investment bankers and brokers to pay a commission known as a "finder's commission" of 1% of the bonds to the person furnishing information resulting in the purchase of the bonds.

In the second additional count it was alleged that plaintiff was employed by defendant to make a contract between the defendant and the hotel company. Defendant denied that it employed plaintiff; further denied that the act of alleged to have been

made by plaintiff between defendant and the hotel company ever resulted in the purchase of the bonds; alleged that defendant never acted upon that information but that the contact and purchase resulted through the other investment house, wholly independent of anything done by plaintiff.

Plaintiff's president testified that plaintiff was a licensed real estate broker doing business in Chicago; that on November 3, 1924, while in the office of Peabody, Houghteling Company in Chicago, he was handed a circular by Mr. Butler, descriptive of the Hotel LaSalle's bond issue of $5,000,000; that it had been offered by the hotel company to Dillon, Read & Company, and Kissell, Kinnicutt & Company, and that Butler told him Dillon, Read & Company had dropped out of the matter; that the circular had been withdrawn; that thereupon the witness went to the Hotel LaSalle and talked to Mr. Stevens of the hotel company, and showed him the circular he had just received; that he told Mr. Stevens he had in mind some other houses that might be interested in the bonds; that they talked further about the matter and the witness left, saying he would get a "syndicate agreement" and be back in about an hour, as requested by Mr. Stevens; that Stevens said he in the meantime would get in touch with his father, who apparently had the last word to say for the hotel company. The witness then went to another bond house to see if he could get a syndicate agreement and then went to the office of the defendant Halsey, Stuart & Co., and talked to Mr. Sills about the matter; that Mr. Sills said he had never heard about the bond issue before; that he told Mr. Sills to call Mr. Stevens on the telephone because the witness was due there in an hour; that Mr. Sills said defendant was very much interested in the bond issue but that Mr. Stuart, president of defendant company, was out of the city for the day and would be back in the morning; that Mr. Sills thereupon called Mr. Stevens at the LaSalle hotel and talked about the matter and said

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acted upon that information but that the contract and purchase re-
sulted through the other investment houses, wholly independent of
anything done by plaintiff.

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Chicago, he was handed a circular by Mr. Butler, descriptive of the
Hotel LaSalle's bond issue of $5,000,000; that it had been offered
by the hotel company to Halsey, Read & Company, and Liscell, Sim-
mons & Company, and that Butler told him Halsey, Read & Company
had dropped out of the matter; that the circular had been withdrawn;
that thereupon the witness went to the Hotel LaSalle and talked to
Mr. Stevens of the hotel company, and showed him the circular he had
just received; that he told Mr. Stevens he had in mind some other
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"syndicate agreement" and be back in about an hour, as he needed by
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with his father, who apparently had the last word to say for the
hotel company. The witness then went to another bond house to see
if he could get a syndicate agreement and then went to the office of
the defendant Halsey, Stuart & Co., and talked to Mr. Gillie about the
matter; that Mr. Gillie said he had never heard about the bond issue
before; that he told Mr. Gillie to call Mr. Stevens on the telephone
because the witness was due there in an hour; that Mr. Gillie said
defendant was very much interested in the bond issue; that that Mr.
Stuart, president of defendant company, was out of the city for the
day and would be back in the morning; that Mr. Gillie thereupon called
Mr. Stevens at the LaSalle hotel and talked about the matter and said

that defendant was much interested in the bonds and would like to make an appointment; that after the telephone talk Sills said: "Langley, lay off"; that Mr. Stevens said for him to do so because Stevens had in the meantime got in touch with his father and requested plaintiff to step out of the transaction, which the witness stated plaintiff would do; that he did not intend to negotiate the sale of the bonds but only wanted to make a contact between the parties; that at that time Mr. Sills asked the witness what plaintiff expected out of the matter, to which witness replied he would leave that matter entirely to defendant's fairness, and that the witness said they would settle that matter later; that witness then went to Stevens' office in the hotel but did not see Mr. Stevens and talked to his secretary; that in the afternoon he talked to Mr. Stevens on the telephone, who told him that his father was "wild over my having given you this information regarding the LaSalle hotel," and that he wanted to see his father and explain the matter to him. The witness made an appointment to meet the father the following morning; witness again went to defendant's office and talked to Mr. Sills and told him what had taken place and that he was to see the elder Stevens the following morning. Mr. Sills said he had made an appointment with Mr. Ernest Stevens for November 15th.

The witness further testified that he saw the elder Stevens the following morning and explained to him how plaintiff got into the matter and what he had done up to that time; that Stevens, Sr., said he did not want witness to negotiate with defendant. Witness replied he would not do so but only intended to make a contact between the parties; that he said, "Now, Langley, lay off, and I will get in touch with you if I need you." Witness then went to defendant's office but did not see Mr. Sills, but saw him on the following morning and told him what he had done in the meantime. Sills

that defendant was much interested in the bonds and would like to make an appointment; that after the telephone talk Gills said: "Langley, lay off"; that Mr. Stevens said for him to do so because Stevens had in the meantime got in touch with his father and requested plaintiff to stop out of the transaction, which the witness stated plaintiff would do; that he did not intend to negotiate the sale of the bonds but only wanted to make a contact between the parties; that at that time Mr. Gills asked the witness what plaintiff expected out of the matter, to which witness replied he would leave that matter entirely to defendant's fairness, and that the witness said they would settle that matter later; that witness then went to Stevens' office in the hotel but did not see Mr. Stevens and talked to his secretary; that in the afternoon he talked to Mr. Stevens on the telephone, who told him that his father was "with over my having given you this information regarding the LaSalle hotel," and that he wanted to see his father and explain the matter to him. The witness made an appointment to meet the father the following morning; witness again went to defendant's office and talked to Mr. Gills and told him what had taken place and that he was to see the elder Stevens the following morning. Mr. Gills said he had made an appointment with Mr. Ernest Stevens for November 15th.

The witness further testified that he saw the elder Stevens the following morning and examined to him how plaintiff got into the matter and what he had done up to that time; that Stevens, Sr., said he did not want witness to negotiate with defendant. Witness replied he would not do so but only intended to make a contact between the parties; that he said, "Now, Langley, lay off, and I will get in touch with you if I need you." Witness then went to defendant's office but did not see Mr. Gills, but saw him on the following morning and told him what he had done in the meantime. Gills

then told him defendant had an appointment for the following morning with the hotel company when he thought the deal would be closed, and that Mr. Stuart liked the deal.

About ten days thereafter, November 13th, plaintiff wrote a letter to defendant in which he said he expected to be paid the usual commission. November 18th the contract was entered into whereby defendant bought $3,333,400 of the hotel company's bonds; the balance of the $5,000,000 issue was sold to Kissell, Kinnicutt & Co.

Plaintiff also called two brokers as witnesses, who testified in answer to hypothetical questions put to them outlining what had been done (as testified to by plaintiff), and that there was a custom to pay a finder's commission of 1% of the par value of the bonds sold, where the bonds were sold as the result of the broker's services in making a contact between the parties. One of these witnesses also testified that, assuming there was no such custom, a broker would be paid a reasonable compensation for making a contact resulting in the sale of the bonds, and that such commission was 1% of the face of the bonds.

Witnesses for defendant testified, in substance, that Langley called at that office November 3, 1924, and talked about the bond issue in question, and that he again called on the 4th and 5th concerning the same matter. Mr. Sills denied that there was anything said by Langley about being paid for making a contact between the parties, and defendant's evidence is also to the effect that there was no custom of paying a "finder's commission" of 1% in such a transaction; that a "finder's commission" meant that where such services were performed, as contended for by plaintiff, nothing would be due and payable to the broker making the contact unless there was an express agreement between the parties.

Defendant's evidence is further to the effect that after

then told him defendant had an appointment for the following morning with the hotel company when he thought the deal would be closed, and that Mr. Stuart liked the deal.

About ten days thereafter, November 18th, plaintiff wrote a letter to defendant in which he said he expected to be paid the usual commission. November 18th the contract was entered into whereby defendant bought $3,333,400 of the hotel company's bonds; the balance of the $5,000,000 issue was sold to Russell, Kinnicutt & Co.

Plaintiff also called two brokers as witnesses, who testified in answer to hypothetical questions put to them outlining what had been done (as testified to by plaintiff), and that there was a custom to pay a finder's commission of 1% of the par value of the bonds sold, where the bonds were sold as the result of the broker's services in making a contact between the parties. One of these witnesses also testified that, assuming there was no such custom, a broker would be paid a reasonable compensation for making a contact resulting in the sale of the bonds, and that such commission was 1% of the face of the bonds.

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Defendant's evidence is further to the effect that after

November 5th defendant dropped the matter and nothing further was done until about ten days thereafter, when a Mr. Terry, who was connected with Kissell, Kinnicutt & Co., called on his friend, Mr. Sills, and spoke about the bond issue, said that Dillon, Read & Company had dropped out of the matter and he wanted to interest defendant in looking into the question of whether it would be willing to purchase some of the hotel company's bonds; that the matter was then taken up with defendant's president, Mr. Stuart, who had not heard of the matter until that time, and negotiations were carried on through Mr. Terry resulting in the two companies buying the bond issue, as above stated, the contract being entered into November 18th.

Defendant contends that there should have been a directed verdict in its favor, and its counsel in their brief say: "Unless this court sustains our contention that the judgment should be reversed without remanding, we ask that the judgment be affirmed." In support of the contention that the court should have directed a verdict in defendant's favor, it is said that all the evidence shows defendant never heard of Langley & Co., a corporation, (the plaintiff) but that their only dealing was with Langley personally; but that even under plaintiff's evidence, viewed most favorably to the plaintiff, there were never any dealings with the plaintiff corporation, but that the only dealing they had was with Langley personally. We think there is no substance in this contention. Langley was president of the plaintiff company, a licensed broker, and of course a corporation must deal through its agent. The contention is exceedingly hypercritical and we think wholly without merit.

It is argued that Langley intruded himself into the transaction without any solicitation from anybody; that he was a mere volunteer, which is undoubtedly true; but there is some evidence to the effect that Langley was encouraged to do something in the matter at the time he first saw Mr. Sills about the transaction.

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It is argued that Langley intruded himself into the transaction without any solicitation from anybody; that he was a mere volunteer, which is undoubtedly true; but there is some evidence to the effect that Langley was encouraged to do something in the matter at the time he first saw Mr. Gills about the transaction.

It is also contended that before such a broker is entitled to a commission he must have been the procuring cause of the transaction, and that all the evidence shows that what Langley did did not result in defendant buying the bonds, but on the contrary the purchase of the bonds by defendant and by Kissell, Kinnicutt & Co. resulted from the efforts of Mr. Terry of the latter company; that this evidence is wholly uncontradicted and therefore there should have been a directed verdict for defendant.

There is considerable merit in this contention, but upon a consideration of all the evidence in the record we think we would not be warranted in holding that there was no evidence, viewed most favorably for plaintiff, that the purchase of the bonds by defendant did not result from Langley's efforts. That question should be submitted to the jury even though the court be of opinion that in case a verdict was returned for plaintiff it would have to be set aside on the ground that it was against the manifest weight of the evidence. Libby, McNeill & Libby v. Cook, 222 Ill. 206. In that case the court, in considering the question as to when there should be a directed verdict for the defendant, said (p.213): "Evidence fairly tending to prove the cause of action set out in the declaration may be the testimony of one witness only, and he may be directly contradicted by twenty witnesses of equal or greater credibility; still the motion must be denied, and if a verdict for the plaintiff follows, the question whether it is manifestly against the weight of the evidence is for the trial court upon motion for a new trial, and, in the event of that motion being overruled and a judgment entered, for the Appellate court upon error properly assigned."

We think the verdict is against the manifest weight of the evidence. It seems almost grotesque to say that there was a uniform custom among brokers and investment houses in Chicago that would render the defendant liable to plaintiff for $50,000, based merely

It is also contended that before such a broker is entitled to a commission he must have been the procuring cause of the transaction, and that all the evidence shows that what finally did not result in defendant buying the bonds, but on the contrary the purchase of the bonds by defendant and by Kissell, Kinnicutt & Co. resulted from the efforts of Mr. Ferry of the latter company; that this evidence is wholly uncontradicted and therefore there should have been a directed verdict for defendant.

There is considerable merit in this contention, but upon a consideration of all the evidence in the record we think we would not be warranted in holding that there was no evidence, viewed most favorably for plaintiff, that the purchase of the bonds by defendant did not result from Ferry's efforts. That question should be submitted to the jury even though the court be of opinion that in case a verdict was returned for plaintiff it would have to be set aside on the ground that it was against the manifest weight of the evidence. Libby, McNeill & Libby v. Cook, 222 Ill. 266. In that case the court, in considering the question as to when there should be a directed verdict for the defendant, said (p.272): "Evidence fairly tending to prove the cause of action set out in the declaration may be the testimony of one witness only, and he may be directly contradicted by twenty witnesses of equal or greater credibility; still the motion must be denied, and if a verdict for the plaintiff follows, the question whether it is manifestly against the weight of the evidence is for the trial court upon motion for a new trial, and, in the event of that motion being overruled and a judgment entered, for the appellate court upon error properly assigned."

We think the verdict is against the manifest weight of the evidence. It seems almost grotesque to say that there was a uniform custom among brokers and investment houses in Chicago that would render the defendant liable to plaintiff for $[illegible], based merely

on the conversations had between Langley and Sills. It seems contrary to common sense to say that the defendant would know that under the prevailing custom it would be liable to pay Langley $50,000 for what he did in the matter.

Moreover, it seems equally unreasonable to believe that Langley thought there was any such custom as would warrant him in receiving $50,000 from the defendant in case the bonds were purchased, because at the same time he brought this suit he also brought a similar action claiming the $50,000 from the Hotel LaSalle company. If there was a custom, as plaintiff's witnesses testify, that a finder's commission of 1% was to be paid by the purchasing house, it seems utterly unreasonable that a broker would at the same time claim the $50,000 from the Hotel LaSalle company, the issuer of the bonds. All of plaintiff's evidence is that the commission was to be paid by the purchasing house.

We are also of the opinion that the verdict is against the manifest weight of the evidence from the fact that although plaintiff was claiming $50,000 and all its witnesses gave testimony to the effect that this was the sum it was entitled to, and this, too, whether it was a fact that there was such a custom or whether plaintiff was paid the reasonable and usual fee for the service actually rendered, yet the jury returned a verdict for $1,000 and it makes no complaint. There is no evidence that warrants a finding of $1,000 but since the defendant does not want the cause remanded, the judgment is affirmed.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

on the conversations had between Langley and Hill. It seems contrary to common sense to say that the defendant would know that under the prevailing custom it would be liable to pay Langley $30,000 for what he did in the matter.

Moreover, it seems equally unreasonable to believe that Langley thought there was any such custom as would warrant him in receiving $30,000 from the defendant in case the bonds were purchased, because at the same time he brought this suit he also brought a similar action claiming the $30,000 from the Hotel Bellle company. If there was a custom, as plaintiff's witnesses testify, that a finder's commission of 1% was to be paid by the purchasing house, it seems utterly unreasonable that a broker would at the same time claim the $30,000 from the Hotel Bellle company, the issuer of the bonds. All of plaintiff's evidence is that the commission was to be paid by the purchasing house.

We are also of the opinion that the verdict is against the manifest weight of the evidence from the fact that although plaintiff was claiming $30,000 and all its witnesses gave testimony to the effect that this was the sum it was entitled to, and this, too, whether it was a fact that there was such a custom or whether plaintiff was paid the reasonable and usual fee for the service actually rendered, yet the jury returned a verdict for $1,000 and it makes no complaint. There is no evidence that warrants a finding of $1,000 but since the defendant does not want the cause remanded, the judgment is affirmed.

The judgment of the circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

37369

CAMELA CAPUTO,
Appellee,

vs.

THE FIDELITY LIFE ASSOCIATION,
a Fraternal Benefit Society,
formerly known as The Mystic
Workers,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

48 47

275 I.A. 633

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action to recover $3,000 claimed to be due her under two policies of insurance issued by the defendant on the life of Angelina Caputo, in which plaintiff was named as the beneficiary. The policy for $2,000 was dated September 19, 1930, and the policy for $1,000 November 6, 1930. The defendant denied liability. There was a trial before the court without a jury, a finding and judgment in plaintiff's favor for $2,000, and defendant appeals, the court apparently finding that the policy for $2,000 was in full force and effect and that the $1,000 policy had lapsed for failure to pay the premium. The plaintiff has assigned no cross errors and is not complaining that the judgment should have been for $3,000.

The record discloses that John C. Nuzzo, representing the defendant insurance company, solicited plaintiff and her mother-in-law, the insured, and delivered the two insurance policies, collecting $123.22, the annual premium due on the $2,000, and $61.61 annual premium on the $1,000 policy. These payments kept each of the policies in force and effect for one year after their respective dates. Afterward, the defendant admits, payments of two monthly premiums were made on the $2000 policy, which carried it to the end of October, 1931, and defendant contends that after that time it received no premiums on that policy. The defendant further contends that it never received any premium on the policy for $1,000,

37359

CARMEN CARUTO,

Appellee,

vs.

THE FIDELITY LIFE ASSOCIATION, a Fraternal Benefit Society, formerly known as The Mystic Workers,

Appellant.

APPEAL FROM MULTNOMAH COUNT OF C IDAHO.

275 I.A. 633

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action to recover $3,000 claimed to be due her under two policies of insurance issued by the defendant on the life of Angelina Caruto, in which plaintiff was named as the beneficiary. The policy for $2,000 was dated September 15, 1930, and the policy for $1,000 November 6, 1930. The defendant denied liability. There was a trial before the court without a jury, a finding and judgment in plaintiff's favor for $2,000, and defendant appeals. The court apparently finding that the policy for $2,000 was in full force and effect and that the $1,000 policy had lapsed for failure to pay the premium. The plaintiff has assigned no cross error and is not contending that the judgment should have been for $3,000.

The record discloses that John C. Bueno, representing the defendant insurance company, solicited plaintiff and her mother-in-law, the insured, and delivered the two insurance policies, collecting $123.32, the annual premium due on the $2,000, and $61.61 annual premium on the $1,000 policy. These payments kept each of the policies in force and effect for one year after their respective dates. Afterward, the defendant admits, payments of two monthly premiums were made on the $2000 policy, which carried it to the end of October, 1931, and defendant contends that after that time it received no premiums on that policy. The defendant further contends that it never received any premium on the policy for $1,000,

and furthermore that the $1,000 policy was never issued by it.

Plaintiff's evidence is to the effect that she paid all premiums on both policies from time to time to John C. Nuzzo, as representative of the defendant company; that 2 or 3 days after the insured died, she delivered the two policies to Nuzzo, together with a death certificate, for him to take the matter up with the insurance company and secure payment of the two policies, which Nuzzo agreed to do; that afterward Nuzzo requested a birth certificate, and some months later a marriage certificate, both of which plaintiff obtained from Italy and delivered to Nuzzo at different times; that plaintiff was pressing Nuzzo for payment and he was giving excuses as to why the company had not paid the policies.

Defendant offered in evidence a letter dated March 8, 1932, written by it to John Nuzzo severing his connection with defendant, in which it was said: "For good and sufficient reasons we deem it in the interest of our society to discontinue your services.***

"You will please return to this office all blanks, rate books and other property belonging to this Association and make full accounting of all moneys collected for our account."

Plaintiff's testimony is further to the effect that she paid all premiums due under the policy from time to time to Nuzzo and that he gave her receipts therefor, some of which she was unable to produce at the trial. Evidence on behalf of the defendant is to the effect that it received no premiums on the $2000 policy after October, 1931, and none at any time on the $1000 policy.

When plaintiff was closing her case, counsel stated that they wished to produce Nuzzo as a witness, and the record discloses that an order of the court had been entered awarding a writ of attachment to bring Nuzzo in as a witness; and after defendant had put in part of its case Nuzzo was brought in and placed on the

and furthermore that the $1,000 policy was never issued by it.

Plaintiff's evidence is to the effect that she paid all premiums on both policies from time to time to John C. Nunno, as representative of the defendant company; that 2 or 3 days after the insured died, she delivered the two policies to Nunno, together with a death certificate, for him to take the matter up with the insurance company and secure payment of the two policies, which Nunno agreed to do; that afterward Nunno requested a birth certificate, and some months later a marriage certificate, both of which plaintiff obtained from Italy and delivered to Nunno at different times; that plaintiff was pressing Nunno for payment and he was giving excuses as to why the company had not paid the policies.

Defendant offered in evidence a letter dated March 8, 1932, written by it to John Nunno severing his connection with defendant, in which it was said: "For good and sufficient reasons we deem it in the interest of our society to discontinue your services.

"You will please return to this office all blanks, rate books and other property belonging to this Association and make full accounting of all moneys collected for our account."

Plaintiff's testimony is further to the effect that she paid all premium due under the policy from time to time to Nunno and that he gave her receipts therefor, none of which she was unable to produce at the trial. Evidence on behalf of the defendant is to the effect that it received no premiums on the $2000 policy after October, 1931, and none at any time on the $1000 policy.

When plaintiff was closing her case, counsel stated that they wished to produce Nunno as a witness, and the record discloses that an order of the court had been entered sustaining a writ of attachment to bring Nunno in as a witness; and after defendant had put in part of its case Nunno was brought in and placed on the

stand by plaintiff. His testimony is to the effect that he collected all of the premiums on the policies in question and that he pocketed all of the money except the first annual premiums on each policy collected by him when the policies were issued, and probably one or two monthly installments on the $2000 policy.

The evidence further tends to show that neither plaintiff nor the assured had any notice or knowledge that defendant insurance company had, in November, 1932, noted on its records that the $2,000 policy in question was no longer in effect because of non-payment of premiums, and the evidence further tends to show that no notice was given to the insured or to plaintiff that the company had dispensed with Nuzzo's services on March 8, 1932, until several months after the assured died.

Plaintiff put in evidence a receipt signed by Nuzzo for $60 dated March 28, 1932, which was about 20 days after Nuzzo was discharged by defendant. Plaintiff also offered in evidence a receipt dated May 9, 1931, for $20. The first receipt purports to be executed by The Conservative Life Insurance Company, and the second one by the Sun Insurance Agency, both by Nuzzo as agent. These two blank forms of receipt, plaintiff testified, were given to her by Nuzzo for money she had paid on the policies in question; that she had no other insurance except the two policies. There is evidence in the record, however, that her husband and son had two other policies issued by the defendant insurance company.

We think the court might reasonably find from the evidence that plaintiff had, in good faith, paid to Nuzzo all of the premiums due on the $2000 policy; that he purported all the time to be acting for the defendant insurance company and that she had no notice to the contrary until several months after she had delivered the two policies in question to Nuzzo, together with the death certificate and other papers above mentioned, for him to take up the matter of

stand by plaintiff. His testimony is to the effect that he collected all of the premiums on the policies in question and that he pocketed all of the money except the first annual premiums on each policy collected by him when the policies were issued, and probably one or two monthly installments on the $2000 policy.

The evidence further tends to show that neither plaintiff nor the assured had any notice or knowledge that defendant insurance company had, in November, 1932, noted on its records that the $2,000 policy in question was no longer in effect because of non-payment of premiums, and the evidence further tends to show that no notice was given to the insured or to plaintiff that the company had dispensed with Nunzo's services on March 8, 1932, until several months after the assured died.

Plaintiff put in evidence a receipt signed by Nunzo for $60 dated March 28, 1932, which was about 20 days after Nunzo was discharged by defendant. Plaintiff also offered in evidence a receipt dated May 9, 1931, for $30. The first receipt purports to be executed by The Conservative Life Insurance Company, and the second one by the Sun Insurance Agency, both by Nunzo as agent. These two blank forms of receipt, plaintiff testified, were given to her by Nunzo for money she had paid on the policies in question; that she had no other insurance except the two policies. There is evidence in the record, however, that her husband and son had two other policies issued by the defendant insurance company.

We think the court might reasonably find from the evidence that plaintiff had, in good faith, paid to Nunzo all of the premiums due on the $2000 policy; that he purported all the time to be acting for the defendant insurance company and that she had no notice to the contrary until several months after she had delivered the two policies in question to Nunzo, together with the death certificate and other papers above mentioned, for him to take up the matter of

payment of the policies. In these circumstances the policy would not automatically become null and void for non-payment of premiums, as the by-laws provide. Nor is plaintiff barred from recovery because of the contention of defendant that proof of death was not made within 120 days after the death of assured, as the by-laws provide; three or four days after the death plaintiff turned over to Nuzzo (whom she supposed was acting as agent for the defendant company) the policies together with the death certificate. And although no formal proofs of death were made, we think this was sufficient under the circumstances. Nor do we think recovery can not be had because the constitution and by-laws provide that a receipt should be issued for all payments received and that "such receipt shall be upon the regular blank, approved by the proper officers of the Association," and such receipts were not given for the premiums when they were claimed to have been paid, but on the contrary some of the receipts offered by plaintiff in evidence were on blanks of two other insurance companies, namely, The Conservative Life Insurance Company and the Sun Insurance Agency. If the premiums were paid to Nuzzo as a representative of defendant insurance company, the policy would not be rendered invalid because the agent gave a receipt on the blank of some other insurance company. In this connection it must be remembered that plaintiff, who paid all the premiums, could not read or write either the Italian or English language. It was the duty of the defendant insurance company to notify its policy holders that Nuzzo was discharged on Maych 8, 1932. Clark v. National Union Fire Ins. Co., 159 Ill. App. 256; Watertown Fire Ins. Co. v. Rust, 141 Ill. 85; Merchants Ins. Co. v. Oberman, 99 Ill. App. 357. And the record discloses that defendant assumed this duty because its evidence is to the effect that it notified all its policy holders whose policies were in force and effect as shown by its record. But no notice was sent to

payment of the policies. In these circumstances the policy would not automatically become null and void for non-payment of premiums, as the by-laws provide. Nor is plaintiff barred from recovery because of the contention of defendant that proof of death was not made within 180 days after the death of assured, as the by-laws provide; three or four days after the death plaintiff turned over to Burns (whom she supposed was acting as agent for the defendant company) the policies together with the death certificate. And although no formal proofs of death were made, we think this was sufficient under the circumstances. Nor do we think recovery can not be had because the constitution and by-laws provide that a receipt should be issued for all payments received and that "such receipt shall be upon the regular blank, approved by the proper officers of the Association," and such receipts were not given for the premiums when they were claimed to have been paid, but on the contrary some of the receipts offered by plaintiff in evidence were on blanks of the other insurance companies, namely, The Conservative Life Insurance Company and the Sun Insurance Agency. If the premiums were paid to Burns as a representative of defendant insurance company, the policy would not be rendered invalid because the agent gave a receipt on the blank of some other insurance company. In this connection it must be remembered that plaintiff, who paid all the premiums, could not read or write either the Italian or English language. It was the duty of the defendant insurance company to notify its policy holders that Burns was discharged on March 8, 1932. Ehrle v. National Union Fire Ins. Co., 180 Ill. App. 286; Waterfown Fire Ins. Co. v. Hart, 141 Ill. 35; Hardwarde Ins. Co. v. Oberman, 90 Ill. App. 387. And the record discloses that defendant assumed this duty because its evidence is to the effect that it notified all its policy holders whose policies were in force and effect as shown by its records. But no notice was sent to

the plaintiff or the assured in the instant case because the record of the defendant company, made by itself, indicates that the $2000 policy was not in effect after October, 1931.

Furthermore, there is no evidence in the record that the assured or the plaintiff received any notice from the defendant on or about November, 1931, that it was claimed the $2000 policy in question was no longer in effect. It may not have been necessary for the insurance company to give such notice, but in view of the evidence in the instant case to the effect that plaintiff continued to pay the premiums to the agent, Nuzzo, who pocketed the money, the defendant is now estopped to say that the policy was cancelled in November, 1931.

But the defendant contends the evidence shows that Nuzo was authorized to collect only the annual or first premium on the policies in question; we think this is contrary to the evidence. The oral testimony given by Nuzzo and by plaintiff tends to show that the premiums were paid to him, but the written contract between the defendant company and Nuzzo, which is in the record, expressly provides: "I also agree to turn over all moneys collected for premiums, if any, to the local lodge/correspondent or Home Office, and render such written reports as may be required."

Defendant further contends that the court erred in its ruling on the admission of evidence. And in this connection it is said the court permitted plaintiff to give conversations with Nuzzo after the death of the insured. From what we have said, we think this evidence was properly admitted. Nuzzo, so far as plaintiff was concerned, was ostensibly agent of the insurance company. He is the one with whom plaintiff dealt prior to the death of the insured, and it is customary to take up proofs of death with the same agent. What we have heretofore said in reference to two receipts written by Nuzzo on blanks of two other insurance companies is sufficient to

the plaintiff or the assured in the instant case because the record of the defendant company, made by itself, indicates that the $2000 policy was not in effect after October, 1931.

Further are, there is no evidence in the record that the assured or the plaintiff received any notice from the defendant on or about November, 1931, that it was claimed the $2000 policy in question was no longer in effect. It may not have been necessary for the insurance company to give such notice, but in view of the evidence in the instant case to the effect that plaintiff continued to pay the premiums to the agent, Burns, who pocketed the money, the defendant is now estopped to say that the policy was cancelled in November, 1931.

But the defendant contends the evidence shows that Burns was authorized to collect only the annual or first premium on the policies in question; we think this is contrary to the evidence. The oral testimony given by Burns and by plaintiff tends to show that the premiums were paid to him, but the written contract between the defendant company and Burns, which is in the record, expressly provides: "I also agree to turn over all moneys collected for premiums, if any, to the local manager or home Office, and render such written reports as may be required."

Defendant lays a strenuous fight, the court erred in its ruling on the admission of evidence. And in this connection it is said the court permitted plaintiff to give conversations with Burns after the death of the insured. Aforesaid we have said, we think this evidence was properly admitted. Burns, so far as plaintiff was concerned, was certainly agent of the insurance company. He is the one with whom plaintiff dealt prior to the death of the insured, and it is customary to take no proofs of death with the same agent. That we have heretofore said in reference to the receipts written by Burns on blanks of two other insurance companies is sufficient to

show that these two receipts were properly admitted in evidence.

A further complaint is made that the court permitted the witness, Nuzzo, to refresh his recollection from memoranda which he had copied a few days before the trial from "receipt stubs" he had in his office. The substance of the witness's testimony is that three or four days before the trial he was requested by counsel for plaintiff to ascertain the amount of money he had been paid as premiums on the policies in question; that he afterward examined receipt stubs he had in his office and made some memoranda which he held in his hands on the witness stand, and after examining them he testified in substance to the amounts of premiums collected by him and that he made the memoranda. While the witness was not interrogated very specifically as to whether his memory was refreshed from an examination of the memoranda, yet that was assumed by counsel for both parties, and the court so understood the witness's testimony. If counsel for the defendant desired to examine the stubs from which the witness testified he had made the memoranda, he might have asked for a continuance so as to have the stubs produced. We think the evidence was not incompetent.

While there are some errors in the record, we think they are not of such character as to warrant us in disturbing the finding and judgment.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

show that these two receipts were properly admitted in evidence.

A further complaint is made that the court permitted the witness, Nunes, to refresh his recollection from memoranda which he had copied a few days before the trial from "receipt stubs" he had in his office. The substance of the witness's testimony is that three or four days before the trial he was requested by counsel for plaintiff to ascertain the amount of money he had been paid as premiums on the policies in question; that he afterward examined receipt stubs he had in his office and made some memoranda which he held in his hands on the witness stand, and after examining them he testified in substance to the amounts of premiums collected by him and that he made the memoranda. While the witness was not interrogated very specifically as to whether his memory was refreshed from an examination of the memoranda, yet that was assumed by counsel for both parties, and the court so understood the witness's testimony. If counsel for the defendant desired to examine the stubs from which the witness testified he had made the memoranda, he might have asked for a continuance so as to have the stubs produced. We think the evidence was not incompetent.

While there are some errors in the record, we think they are not of such character as to warrant us in disturbing the finding and judgment.

The judgment of the municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, J., and McSurely, J., concur.

37378

WORLD AMUSEMENT SERVICE ASSOCIATION, INC., a Corporation, for use of J. J. HEFFERN,
Appellant,

vs.

A CENTURY OF PROGRESS, a Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

275 I.A. 634

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

This is a garnishment proceeding brought by the World Amusement Service Association, Inc., a corporation, for the use of J. J. Heffern, against A Century of Progress.

The record discloses that Heffern obtained a judgment against the World Amusement Service Association, Inc., in Minnesota, and afterward brought suit on that judgment in the Superior court of Cook county, Illinois, and had judgment. A Century of Progress was served as garnishee. It filed an answer denying that it owed any money to the World Amusement Service Association, Inc., but in answer to an interrogatory stated that it owed Thearle-Duffield Fireworks, Inc., $19,148.56. The answer was traversed and on the hearing it was stipulated that the only question involved was whether A Century of Progress owed any money to the World Amusement Service Association, Inc. The case was tried before the court withou a jury and there was a finding and judgment in favor of the garnishee. It was discharged and plaintiff appeals.

There is substantially no dispute as to the facts in the case, but Heffern - who will hereinafter be referred to as plaintiff- contends that the Thearle-Duffield Fireworks, Inc., an Illinois corporation, in the successor of the World Amusement Service Association, Inc.; that there was a mere change of names and shifting of assets; that the officers and stockholders in the several corporations hereinafter mentioned were substantially the same - that there

STATE

WORLD AMUSEMENT SERVICE ASSOCIATION,
INC., a Corporation, for use of
L. L. HOFFMAN,
Appellant,

vs.

A CENTURY OF PROGRESS, a Corporation,
Appellee.

APPEAL FROM BRANCH
COURT OF COOK COUNTY.

275 I.A. 534

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

This is a garnishment proceeding brought by the World Amusement Service Association, Inc., a corporation, for the use of L. L. Hoffman, against A Century of Progress.

The record discloses that Hoffman obtained a judgment against the World Amusement Service Association, Inc., in minnesota, and afterward brought suit on that judgment in the Superior court of Cook county, Illinois, and had judgment. A Century of Progress was served as garnishee. It filed an answer denying that it owed any money to the World Amusement Service Association, Inc., but in answer to an interrogatory stated that it owed Thorsie-Hartfield Fixtures, Inc., $18,144.50. The answer was traversed and on the hearing it was stipulated that the only question involved was whether A Century of Progress owed any money to the World Amusement Service Association, Inc. The case was tried before the court without a jury and there was a finding and judgment in favor of the garnishee. It was discharged and plaintiff appeals.

There is substantially no dispute as to the facts in the case, but Hoffman - who will hereinafter be referred to as plaintiff- contends that the Thorsie-Hartfield Fixtures, Inc., an Illinois corporation, is the successor of the World Amusement Service Association, Inc.; that there was a mere change of name and a sifting of assets; that the officers and stockholders in the several corporations hereinafter mentioned were substantially the same - that there

was a mere change of names of the various corporations to defeat payment of the judgments entered in the Minnesota court and in the Illinois court.

The record discloses that the World Amusement Service Association, Ltd., was organized as a corporation under the laws of this State October 12, 1923, and two months afterward, December 12, 1923, it was duly authorized to change its name to World Amusement Service Association, Inc. Afterward, on suit brought by the Attorney General of this State, a decree was entered in the Superior court of Cook county June 28, 1929, dissolving the World Amusement Service Association, Ltd., and later in the same court another suit was brought by the Attorney General in which a decree was entered July 15, 1931, dissolving the World Amusement Service Association, Inc.

It further appears from the record that Heffern, the plaintiff, obtained a judgment in Minnesota in 1927 for $1345.19 against the World Amusement Service Association, Inc.; that afterward, July 24, 1931, judgment was entered by the Superior court of Cook county in favor of plaintiff and against the defendant on the Minnesota judgment.

About the time judgment was rendered in Minnesota the Thearle-Duffield Fireworks Co. of Delaware was organized. It afterward went into bankruptcy in Indiana and apparently the trustee sold its assets to one Cunliffe, and about that time the Thearle-Duffield Fireworks, Inc., of Illinois, was organized. The last named corporation entered into a contract with the garnishee, A Century of Progress, to furnish fireworks; and it is under that contract that the garnishee admits it owes nearly $20,000. All of the above named companies did business at 624 South Michigan avenue, Chicago, and all of them were engaged, among other activities, in furnishing fireworks to various places of amusement and entertainment.

was a more change of name of the various corporations to defeat payment of the judgments entered in the Minnesota court and in the Illinois court.

The record indicates that the World Amusement Service Association, Ltd., was organized as a corporation under the laws of this State October 12, 1923, and two months afterward, December 17, 1923, it was duly authorized to change its name to World Amusement Service Association, Inc. Afterward, an suit brought by the Attorney General of this State, a decree was entered in the Superior court of Cook county June 20, 1928, dissolving the World Amusement Service Association, Ltd., and later in the same court another suit was brought by the Attorney General in which a decree was entered July 15, 1931, dissolving the World Amusement Service Association, Inc.

It further appears from the record that Herman, the plaintiff, obtained a judgment in Minnesota in 1927 for $1,132.12 against the World Amusement Service Association, Inc.: that afterward, July 24, 1931, judgment was entered by the Superior court of Cook county in favor of plaintiff and against the defendant on the Minnesota judgment.

About the time the last suit was instituted in Minnesota the Theatre-Duffield Fireworks Co. of Delaware was organized. It afterward went into bankruptcy in Illinois and apparently its trustee sold its assets to one Conlife, and about that time the Theatre-Duffield Fireworks, Inc., of Illinois, was organized. The last named corporation entered into a contract with the Gamblins, a Country of Greece, to furnish fireworks; and it is under that contract that the Gamblins claim it owes nearly $80,000. All of the above companies did business at 201 South Michigan avenue, Chicago, and all of them were engaged, among other activities, in furnishing fireworks to various places of amusement and entertainment.

From what we have said it is clear that the facts are somewhat complicated. One corporation after another has been organized by substantially the same incorporators and the list of stockholders is likewise nearly the same. The learned trial Judge, on a number of occasions near the close of the case, said that if there were evidence to show that there was a shifting of assets from one corporation to another, as counsel for plaintiff contended, he would enter judgment against the garnishee, but that he was unable to find any evidence to this effect; that, "The best you have got is suspicion but I can't act on that." There is little or no evidence of shifting of assets; in fact there is little evidence of any assets except that apparently the various concerns entered into contracts with amusement companies in a number of States, which contracts constituted most of the assets of the various corporations. Nearly $20,000 was due under the contract with the garnishee at the time of the garnishment summons.

We are unable to find any evidence of substance that there was a shifting of assets from one corporation to another, and while, as the trial Judge said, in view of the suit pending in Minnesota, the forming of one corporation after another looks suspicious, yet a judgment cannot be based on surmise or suspicion. We are certain we would not be warranted in holding that the finding of the trial Judge is against the manifest weight of the evidence, and in this view of the case it is obvious that under the law we would not be warranted in disturbing the judgment.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

From what we have said it is clear that the facts are some-
what complicated. The prosecution either [illegible] been obscuring
by subterfuge the [illegible] or else is simply [illegible]
is likewise merely the case. The learned [illegible], on a number
of occasions [illegible] evidence to show [illegible] one cor-
poration to another. We submit for [illegible], [illegible] would
enter judgment [illegible] to find
any evidence to [illegible]; that, "[illegible]
but I can't see [illegible]." There is little or no [illegible] of
of assets; in fact there is little evidence of [illegible]
apparently the various companies [illegible]
companies in a number of ways. [illegible]
the assets of the various corporations. [illegible]
under the control [illegible]
[illegible].

We are [illegible] to find any evidence [illegible]
was a willing [illegible] from [illegible], [illegible],
as the trial judge said, [illegible]
[illegible] of the corporation [illegible].

Judgment cannot be entered on [illegible]. [illegible]
we would not be [illegible] in [illegible] the [illegible]
Judge [illegible] the [illegible] view, and to [illegible]
view of the case [illegible] [illegible]
[illegible] in dismissing the [illegible].

[illegible] of the [illegible] [illegible].

[illegible].

[illegible], [illegible], [illegible].

37379

WORLD AMUSEMENT SERVICE ASSOCIATION, INC., a Corporation, for use of Henry C. Larson,

Appellant,

vs.

A CENTURY OF PROGRESS, a Corporation,

Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

275 I.A. 634

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

This is a garnishment proceeding brought on a judgment for $11,169.19, obtained by Henry C. Larson against the World Amusement Service Association, Inc., in the state of Minnesota. Afterward a judgment was rendered by the Superior court of Cook county on that judgment. Thereafter, A Century of Progress, a corporation, was served as garnishee, claiming that it was indebted to the World Amusement Service Association, Inc. The garnishee answered that it was not indebted to the World Amusement Service Association, Inc., but was indebted to the Thearle-Duffield Fireworks, Inc., a corporation, in the sum of nearly $20,000, under a written contract entered into between the garnishee and that corporation. The answer was traversed. There was a trial before the court without a jury, and a finding and judgment in favor of the garnishee; this appeal followed.

We have today filed an opinion in World Amusement Service Association, Inc., a corporation, for use of J. J. Heffern, against A Century of Progress, Number 37378. The facts in that case are the same as in the instant case, and for the reasons stated in that opinion the judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

WORLD AMUSEMENT SERVICE ASSOCIATION, INC., a Corporation, for use of Henry C. Larson,

Appellant,

vs.

A CENTURY OF PROGRESS, a Corporation,

Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

This is a proceeding procedendo involving an a judgment for $11,169.19, obtained by Henry C. Larson against the World Amusement Service Association, Inc., in the state of Illinois. Afterward a judgment was rendered by the Superior court of Cook county on that judgment. Thereafter, a Century of Progress, a corporation, was served as garnishee, claiming that it was indebted to the World Amusement Service Association, Inc. The garnishee answered that it was not indebted to the World Amusement Service Association, Inc., but was indebted to the Chicago-Cleveland Airways, Inc., a corporation, in the sum of $[illegible], and, under a written contract entered into between the garnishee and that corporation, the money was traversed. There was a trial before the court without a jury, and a finding and judgment in favor of the garnishee; this appeal followed.

In our today filed opinion in cause, in World Amusement Service Association, Inc., a Delaware corporation, for use of [illegible], against A Century of Progress, Cook County [illegible], the issues in that case are the same as in the instant case, and in the opinion rendered in that opinion the judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

37380

WORLD AMUSEMENT SERVICE ASSOCIATION, INC., a Corporation, for use of Carrie Ellingson, as Widow of A. S. Ellingson, Deceased,
Appellant,

vs.

A CENTURY OF PROGRESS, a Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

275 I.A. 634[3]

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

This is a garnishment proceeding brought on a judgment for $19,508.99, obtained by Carrie Ellingson against the World Amusement Service Association, Inc., in the State of Minnesota; afterward a judgment was rendered by the Superior court of Cook county on that judgment. Thereafter, A Century of Progress, a corporation, was served as garnishee, claiming that it was indebted to the World Amusement Service Association, Inc. The garnishee answered that it was not indebted to the World Amusement Service Association, Inc., but was indebted to the Thearle-Duffield Fireworks, Inc., a corporation, in the sum of nearly $20,000, under a written contract entered into between the garnishee and that corporation. The answer was traversed. There was a trial before the court without a jury, a finding and judgment in favor of the garnishee, and this appeal followed.

We have today filed an opinion in World Amusement Service Association, Inc., a corporation, for use of J. J. Heffern, against A Century of Progress, Number 37378. The facts in that case are the same as in the case at bar, and for the reasons stated in that opinion the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

37380

WORLD AMUSEMENT SERVICE ASSOCIATION,
INC., a Corporation, for use of
Curtis Hillegass, as Clerk of
A. E. Hillegass, Deceased,

Appellant,

vs.

A CENTURY OF PROGRESS, a Corporation,
Appellee.

APPEAL FROM DECISION
COURT OF COOK COUNTY.

275 I.A. 534

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

This is a replevin proceeding brought on a judgment for $19,202.22, obtained by Curtis Hillegass against the World Amusement Service Association, Inc., in the State of Minnesota; afterward a judgment was rendered by the Superior Court of Cook County on that judgment. Thereafter, A Century of Progress, a corporation, was served as garnishee, claiming that it was indebted to the World Amusement Service Association, Inc. The garnishee answered that it was not indebted to the World Amusement Service Association, Inc., but was indebted to the Midway-Outfitted Concessions, Inc., a corporation, in the sum of nearly $20,000, under a written contract entered into between the garnishee and that corporation. The answer was traversed. There was a trial before the court without a jury, a finding and judgment in favor of the garnishee, and this appeal follows.

We have today filed an opinion in World Amusement Service Association, Inc., a corporation, for use of A. E. Hillegass, against A Century of Progress, Docket 37378. The facts in that case are the same as in the case at bar, and for the reasons stated in that opinion the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

37381

WORLD AMUSEMENT SERVICE ASSOCIATION, INC., a Corporation, for use of Alfred H. Bakke,
Appellant,

vs.

A CENTURY OF PROGRESS, a Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

275 I.A. 634

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

This is a garnishment proceeding brought on a judgment for $11,178.46, obtained by Alfred H. Bakke against the World Amusement Service Association, Inc., in the state of Minnesota, and afterward a judgment was rendered by the Superior court of Cook county on that judgment. Thereafter A Century of Progress, a corporation, was served as garnishee, claiming that it was indebted to the World Amusement Service Association, Inc. The garnishee answered that it was not indebted to the World Amusement Service Association, Inc., but was indebted nearly $20,000 to the Thearle-Duffield Fireworks, Inc., a corporation, under a written contract entered into between the garnishee and that corporation. The answer was traversed. There was a trial before the court without a jury, a finding and judgment in favor of the garnishee, and this appeal followed.

We have today filed an opinion in World Amusement Service Association, Inc., a corporation, for the use of J. J. Heffern, against A Century of Progress, Number 37378. The facts in the case are the same as those in this case, and for the reasons stated in that opinion, the judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

WORLD AMUSEMENT SERVICE ASSOCIATION,
INC., a corporation, formerly of
Alfred H. Beike,
Appellant,

vs.

A CENTURY OF PROGRESS, a corporation,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

275 I.A. 634

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT:

This is a garnishment proceeding arising on a judgment for $11,172.46, obtained by Alfred H. Beike against the World Amusement Service Association, Inc., in the state of Minnesota, and afterwards a judgment was rendered by the superior court of Cook county on that judgment. Thereafter A Century of Progress, a corporation, was served as garnishee, claiming that it was indebted to the World Amusement Service Association, Inc. The garnishee answered that it was not indebted to the World Amusement Service Association, Inc., but was indebted nearly $3,000 to the Atlantic-Pacific Fireworks, Inc., a corporation, under a written contract entered into between the parties and that corporation. The answer was traversed. There was a trial before the court without a jury, a finding and judgment in favor of the garnishee, and this appeal followed.

We have today filed an opinion in World Amusement Service Association, Inc., a corporation, v. J. J. Kelleher, appellant, A Century of Progress, Number 37278. The facts in the case are the same as those in this case, and for the reasons stated in that opinion, the judgment of the superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

37390

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. MARTHA HINZ,
Appellee,

vs.

FRED HOTOPP,
Appellant.

APPEAL FROM CRIMINAL COURT
OF COOK COUNTY.

275 I.A. 635

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant, Fred Hotopp, seeks to reverse a judgment of the Criminal court of Cook county by which that court found that a female child was born to the prosecutrix, Martha Hinz, an unmarried woman, on July 19, 1933, and that defendant was the father of the child; and it was ordered that defendant pay to Martha Hinz $1100 for the support, maintenance and education of the child, payment to be made in installments as provided by the statute

The record discloses that complaint in writing was made by Martha Hinz, under the Bastardy act, chapter 17, of our statutes. The defendant, Fred Hotopp, was charged with being the father of her child. There was a hearing before the justice of the peace and the defendant was held to the Criminal court of Cook county. On the hearing before that court without a jury, the court heard the evidence found defendant was the father of the child, and entered judgment as before stated.

The defendant contends that the finding and judgment are against the manifest weight of the evidence and that there is no evidence that the defendant was the father of the child born to Martha Hinz, the relatrix.

Since we have reached the conclusion that there must be a retrial of the case, we will not discuss the evidence in detail other than to say that if the record were free from other errors complained of, we feel we would not be warranted in reversing the judgment because the finding and judgment were against the manifest

37320

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. MARTHA HINN,
Appellee,

vs.

FRED HOTOPP,
Appellant.

APPEAL FROM CRIMINAL COURT
OF COOK COUNTY.

275 I.A. 635

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant, Fred Hotopp, seeks to reverse a judgment of the criminal court of Cook county by which that court found that a female child was born to the prosecutrix, Martha Hinn, an unmarried woman, on July 18, 1934, and that defendant was the father of the child; and it was ordered that defendant pay to Martha Hinn $1100 for the support, maintenance and education of the child, payment to be made in instalments as provided by the statute.

The record discloses that complaint in writing was made by Martha Hinn, under the bastardy act, chapter 17, of our statutes. The defendant, Fred Hotopp, was charged with being the father of her child. There was a hearing before the justice of the peace and the defendant was held to the criminal court of Cook county. On the hearing before that court without a jury, the court heard the evidence found defendant was the father of the child, and entered judgment as before stated.

The defendant contends that the finding and judgment are against the manifest weight of the evidence and that there is no evidence that the defendant was the father of the child born to Martha Hinn, the relatrix.

Since we have reached the conclusion that there must be a retrial of the case, we will not discuss the evidence in detail other than to say that if the record were free from other errors complained of, we feel we would not be warranted in reversing the judgment because the finding and judgment were against the manifest

weight of the evidence.

Complaint is also made that the court unduly participated in the examination of the witnesses and that the court erred in refusing to permit defendant's counsel to cross examine the relatrix. We think there is merit in this last contention.

The relatrix's testimony is to the effect that she was an unmarried woman about thirty years of age and had sexual relations with the defendant covering a period from March, 1929, until November, 1932, and that the baby was born July 19, 1933; that she never had such relations with any other man.

It seems to be agreed by counsel for both parties that the relatrix is a woman of rather low mentality. When counsel for the defendant sought to cross examine her the court seems to have made up his mind that defendant was guilty and would not permit counsel to interrogate the relatrix except in a very limited degree. Since it was stated by counsel for defendant that the defendant denied having had any illicit relation with relatrix, the court should have permitted considerable latitude to counsel in cross examining her. We do not point out the particular questions put to the witness because on a retrial such errors can be obviated by allowing considerable latitude on the cross examination. The defendant testified in his own behalf, denying that he had any illicit relations with the relatrix.

Defendant further contends that the court erred in overruling his motion for a new trial and in arrest of judgment because the warrant for the arrest of defendant and the bond required by the justice in holding him to the Criminal court were not returned by the justice of the peace to the Criminal court of Cook county.

Whether the omission of the warrant and bond, if they were omitted, would vitiate the judgment, we do not pass upon because this contention was apparently not brought to the attention of the trial court and the objection in this respect, if any, may be obviated on

weight of the evidence.

Complaint is also made that the court unduly participated in the examination of the witnesses and that the court erred in refusing to permit defendant's counsel to cross examine the relatrix. We think there is merit in this last contention.

The relatrix's testimony is to the effect that she was an unmarried woman about twenty years of age and had sexual relations with the defendant covering a period from June, 1920, until November, 1922, and that the baby was born July 16, 1921; that she never had such relations with any other man.

It seems to be argued by counsel for both parties that the relatrix is a woman of rather low morality. When counsel for the defendant sought to cross examine her the court seems to have made up his mind that defendant's guilty and would not permit counsel to incorporate the relatrix answer in a very limited degree. Since it was stated by counsel for defendant that the defendant denied having had any illicit relation with relatrix, the court should have permitted considerable latitude to counsel in cross examining her. We do not point out the particular questions put to the witness because on a retrial such errors can be obviated by allowing considerable latitude on the cross examination. We not about bastardy in his own behalf, denying that he had any illicit relations with the relatrix.

Defendant has not convinced that the court erred in overruling his motion for a new trial and in vacating of judgment based on the default for the amount of dower but was land required by the justice in making his to the criminal court were not returned by the justice of the peace to the criminal court of Cook county.

Whether the omission of the warrant and if, if they were omitted, would vitiate the judgment, we do not rest upon because this contention was apparently not brought to the attention of the trial court and the objection in this respect, if any, may be obviated on

the retrial of the case.

As to whether such warrant and bond are jurisdictional, we express no opinion.

The judgment of the Criminal court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

the retrial of the case.

As to whether such warrant and bond are jurisdictional, we express no opinion.

The judgment of the criminal court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

Mathews, P. J., and McSurely, J., concur.

37192

EMILE R. SHNABLE and JOHN B. QUINN, Copartners, doing business under the firm name of SHNABLE & QUINN,
Plaintiffs in Error,

vs.

THE SANITARY DISTRICT OF CHICAGO, a Municipal Corporation,
Defendant in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

275 I.A. 635

MR. PRESIDING JUSTICE WATCHETT DELIVERED THE OPINION OF THE COURT.

I. In an action of assumpsit and on trial by jury a verdict was returned in favor of plaintiffs for $1015, on which the court, overruling motions for a new trial, entered judgment, to reverse which plaintiffs have sued out this writ. Defendant admitted upon the trial that it owed the amount for which judgment was entered, so that while the verdict is in form for plaintiffs, on the issues as tried it was in fact in favor of defendant.

Plaintiffs are contractors; defendant, a municipal corporation. The matters in controversy arose out of a construction agreement entered into between the parties April 3, 1913. This suit was begun August 22, 1922, and the declaration was filed on that date. The final judgment in the cause was entered October 17, 1931.

The original declaration consisted of four counts. Three of these were special counts. The common counts consolidated were added. Defendant filed a plea of the general issue to the common counts and a special demurrer to the three special counts. The demurrer to the special counts was sustained, and plaintiffs were given leave to amend their declaration.

May 1, 1926, plaintiffs by leave filed an amended declaration consisting of 23 special counts and the consolidated common counts. The original declaration was based upon the theory that plaintiffs were entitled to receive increased compensation by reason of extra-

275 I.A. 635

MEMOR TO DUPLICATE COURT

OF COOK COUNTY.

MARIE H. SHEARER and JOHN E. QUINN, copartners, doing business under the firm name of SHEARER & QUINN,

Plaintiffs in Error,

vs.

THE SANITARY DISTRICT OF CHICAGO, a Municipal Corporation,

Defendant in Error.

MR. PRESIDING JUSTICE DARCHER
DELIVERED THE OPINION OF THE COURT.

1. In an action of assumpsit and on trial by jury a verdict was returned in favor of plaintiffs for $1018, on which the court, overruling motions for a new trial, entered judgment, to reverse which plaintiffs have sued out this writ. Defendant admitted upon the trial that it owed the amount for which judgment was entered, so that while the verdict is in form for plaintiffs, on the issues as tried it was in fact in favor of defendant.

Plaintiffs are contractors; defendant, a municipal corporation. The matters in controversy arose out of a construction agreement entered into between the parties April 3, 1913. This suit was begun August 22, 1916, and the declaration was filed on that date. The final judgment in the cause was entered October 17, 1921.

The original declaration consisted of four counts. Three of these were special counts. The common counts consolidated were added. Defendant filed a plea of the general issue to the common counts and a special demurrer to the three special counts. The demurrer to the special counts was sustained, and plaintiffs were given leave to amend their declaration.

May 1, 1925, plaintiffs by leave filed an amended declaration consisting of 23 special counts and the consolidated common counts. The original declaration was based upon the theory that plaintiffs were entitled to receive increased compensation by reason of extra-

ordinary conditions which arose out of the participation of the United States in the World war pending the execution of the contract. A special demurrer to the amended declaration was filed. May 28, 1927, it was overruled as to counts 1 to 18 inclusive and sustained as to counts 19 to 23. Plaintiffs elected to abide by counts 19 to 23, and the cause went to trial on counts 1 to 18, to which defendant filed the general issue. During the trial, on September 21, 1931, plaintiffs moved for a severance of counts 19, 20 and 21. The motion was denied. At the close of the evidence counts 4, 5, 6, 14, 17 and 18 were on motion of defendant excluded from the jury. Liability to the amount for which the verdict was returned was admitted under counts 1, 2, 3 and 7, so that the cause actually went to the jury on counts 8, 9, 10, 11, 12, 13, 15 and 16.

An appeal was prayed from the judgment but was not perfected, and thereafter plaintiffs sued out this writ of error.

The contract out of which these controversies arise was one for the construction of what is known as section 10 of the Calumet Sag Channel within the jurisdiction of the Sanitary District. The contract as executed provided that plaintiffs should have the work completed by November 1, 1916. The time was extended, however, for 331 days by the chief engineer for the Sanitary District, and his action in that regard was approved by the trustees of the defendant district at a meeting held November 26, 1920.

The first count of the amended declaration demanded compensation for pumping done by reason of an ice obstruction at the 39th street pumping station, and defendant does not contest the sum of $58.85 apparently allowed for this claim. The second and third counts were for extra work ordered in writing by the chief engineer (as the contract provided all such extras should be ordered), the work consisting in making concrete bases for the hand rail on each side of the 48th avenue bridge. The amount allowed by the jury for

ordinary conditions which arose out of the participation of the United States in the world war pending the execution of the contract. A special demurrer to the amended declaration was filed. May 22, 1927, it was overruled as to counts 1 to 14 inclusive and sustained as to counts 15 to 22. Plaintiffs elected to abide by counts 15 to 22, and the cause went to trial on counts 1 to 14, to which defendant filed the general issue. During the trial, on September 21, 1931, plaintiffs moved for a severance of counts 19, 20 and 21. The motion was denied. At the close of the evidence counts 4, 5, 14, 17 and 18 were on motion of defendant excluded from the jury. Liability to the amount for which the verdict was returned was admitted under counts 1, 2, 3 and 7, so that the cause actually went to the jury on counts 6, 9, 10, 11, 12, 13, 15 and 16.

An appeal was prayed from the judgment but was not perfected, and thereafter plaintiffs sued out this writ of error.

The contract out of which these controversies arise was one for the construction of what is known as section 1c of the Calumet Sag Channel within the jurisdiction of the Sanitary District. The contract as executed provided that plaintiffs should have the work completed by November 1, 1910. The time was extended, however, for 331 days by the chief engineer for the Sanitary District, and his action in that regard was approved by the trustees of the defendant district at a meeting held November 26, 1913.

The first count of the amended declaration demanded compensation for damage done by reason of an improvement at the 39th street pumping station, and defendant does not contest the sum of $68,80 necessarily allowed for this claim. The second and third counts were for extra work ordered in writing by the chief engineer (as the contract provided all such extras should be ordered), the work consisting in making concrete beam for the hand rail on each side of the 45th avenue bridge. The amount allowed by the jury for

this item was $321.91. Counts 4, 5 and 6 declared for pumping from the year 1916 until the completion of the work. These counts were excluded by the court. The jury allowed $593.97 found to be due for pumping from September 22, 1917, to October 19, 1917, under count 7. Counts 19, 20 and 21 were based on alleged fraud and deceit of defendant in inducing plaintiffs to enter into the contract in 1913. General and special demurrers to these counts were sustained. We shall notice further material facts as we consider specific errors assigned and argued.

II. Plaintiffs contend in the first place that the court erred in sustaining the general and special demurrer to counts 19, 20 and 21, while defendant argues that there was no error in this respect for the reason that there was a misjoinder, in that while the other counts of the declaration were based on contract, the gist of these three counts was alleged deceit and fraud on the part of defendant, by which plaintiffs were induced to enter into the contract. In substance, these counts aver that by means of what is described as a four-inch boring sheet attached to the specifications and made a part of the same, defendant intentionally deceived plaintiffs as to the kind of material necessary for them to remove in compliance with the terms of the contract. The counts aver in this connection that an inspector's field note book kept by the engineer for the district from which the facts might have been ascertained was designedly kept from the knowledge of plaintiffs, as was also knowledge of certain test pits, which defendant had theretofore caused to be dug and which, it is said, disclosed the nature and quality of the material to be different from that stated in the specifications.

Whatever the rule may be under the present practice or in other states, the well-established rule at the time this demurrer was sustained was that counts in contract could not be joined with counts

this item was $283.91. Counts 4, 5 and 6 declared for pumping from the year 1916 until the completion of the work. These counts were excluded by the court. The jury allowed $805.97 found to be due for pumping from September 22, 1917, to October 19, 1917, under count 7. Counts 18, 20 and 21 were based on alleged fraud and deceit of defendant in inducing plaintiffs to enter into the contract in 1913. General and special demurrers to these counts were sustained. We shall notice further material facts as we consider specific errors assigned and argued.

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Whatever the rule may be under the present practice or in other states, the well-established rule at the time this demurrer was sustained was that counts in contract could not be joined with counts

charging fraud and deceit. As stated in 1 Corpus Juris 1065, sec. 209:

"It is a well established rule at common law that a cause of action arising ex contractu cannot be joined with a cause of action arising ex delicto. Hence it is improper to join counts in assumpsit with counts founded on fraud and deceit."

That the question was properly raised by the demurrer under the former practice, see Dolson v. Bradbury, 50 Ill. 82; Chicago Title & Trust Co. v. Core, 223 Ill. 58, and that the rule under the Illinois practice was as above defined, see Boetling v. Wright, 72 Ill. 390; Clements v. Second National Bank of Danville, 266 Ill. App.225.

We think, too, these counts were vulnerable to a special demurrer, in that there were no allegations (except in general terms and as a conclusion merely) that the trustees of the Sanitary District in fact had knowledge of the alleged fraudulent representations by which plaintiffs claim they were deceived. Moreover, all the facts as alleged compel the inference that the action based on fraud had been necessarily waived and the contract as in fact made ratified. 27 Corpus Juris 25, sec. 137.

It is also true, as defendant points out, that the cause of action was barred by the statute of limitations. Smith-Hurd's Ill. Rev. Stats. 1933, chap. 83, sec. 16, par. 17; McNeil v. Bulkey, 269 Ill. App. 1, but this question of course could not be raised by demurrer.

III. It is contended by plaintiffs in the next place that the court erred in sustaining the special demurrer to counts 22 and 23 of the amended declaration. These counts in substance aver the execution of the contract; that plaintiffs immediately entered upon the performance of it; that changes made in the plans by defendant prevented plaintiffs from completing the same on the date provided by the contract, namely, November 1, 1916. Both counts set up verbatim article 27 of the contract, which provides that:

"Should the contractor be obstructed or delayed in the commencement, prosecution or completion of any part of said work by

charging fraud and deceit. As stated in 1 Corpus Juris 1082, sec. 209:

"It is a well established rule at common law that a cause of action arising ex contractu cannot be joined with a cause of action arising ex delicto. Hence it is improper to join counts in assumpsit with counts founded on fraud and deceit."

That the question was properly raised by the demurrer under the former practice, see Dotson v. Bradbury, 80 Ill. 88; Chicago Title & Trust Co. v. Cox, 283 Ill. 34, and that the rule under the Illinois practice was as above defined, see Moulton v. Wright, 72 Ill. 390; Glenwis v. Second National Bank of Danville, 266 Ill. App.282.

We think, too, these counts were vulnerable to a special demurrer, in that there were no allegations (except in general terms and as a conclusion merely) that the knowledge of the Sanitary District in fact had knowledge of the alleged fraudulent representations by which plaintiffs claim they were deceived. However, all the facts as alleged cement the inference that the action based on fraud had been necessarily waived and the contract as in fact made ratified. 27 Corpus Juris 23, sec. 137.

It is also true, as defendant points out, that the cause of action was barred by the statute of limitations. Smith-Hurd's Ill. Rev. Stats. 1933, chap. 83, sec. 18, par. 17; Morgil v. Quinsey, 262 Ill. App. 1, but this question of course could not be raised by demurrer.

III. It is contended by plaintiffs in the next place that the court erred in sustaining the special demurrer to counts 22 and 23 of the amended declaration. These counts in substance aver the execution of the contract; that plaintiffs immediately entered upon the performance of it; that changes made in the plans by defendant prevented plaintiffs from completing the work on the date provided by the contract, namely, November 1, 1916. Both counts set up verbatim article 27 of the contract, which provides that:

"Should the contractor be obstructed or delayed in the commencement, prosecution or completion of any part of said work by

any necessary or unavoidable act or delay of the Sanitary District or by riot, insurrection, war, pestilence, acts of public authorities, fire, lightning, earthquake, cyclone or through any default of other parties under contract with said Sanitary District, then the time herein fixed for the completion of such part of said work so delayed shall be extended for a period equivalent to the time lost by reason of any of the causes aforesaid; but no such allowance shall be made unless a claim therefor in writing is presented to the engineer within four days after the commencement of such delay, and it is further expressly agreed that said contractor shall not be entitled to any damages or compensation from the said Sanitary District on account of any delays resulting from any of the causes above specified; said engineer shall decide the number of days that said contractor has been so delayed and his decision shall be final and binding upon both parties hereto."

The counts further aver that on April 6, 1917, the United States declared war on the Imperial German government and that plaintiffs were inevitably and substantially delayed by the prosecution of that war; that on April 9, 1917, plaintiffs notified the engineer of defendant in writing of that fact and asked an extension of time for completion of the contract; that on or about May 1, 1917, defendant, "in a lawful manner" requested plaintiffs give up their right to an extension of time and to suspend operations and promised that if plaintiffs would proceed with the completion of the work, defendant would pay plaintiffs, upon completion of the work, the additional cost over and above the prices promised by the contract; that relying on this promise plaintiffs completed the work September 22, 1917. The 22nd count avers that the additional cost was $52,080, and that the various notices, etc., provided for by the contract were waived by defendant "in a lawful manner," but that the engineer arbitrarily refused to grant a certificate therefor.

The 23d count likewise avers the making of a contract, sets up article 27 thereof verbatim, avers that plaintiffs immediately entered upon the performance of the contract and that they were not in default when the World war arose on August 4, 1914; that the cost of labor, dynamite and other materials were thereby increased; that on August 9th plaintiffs served a written claim upon the

any necessary or unavoidable act or delay of the Sanitary District or by riot, insurrection, war, pestilence, acts of public authorities, fire, lightning, earthquake, explosions or through any default of other parties under contract with said Sanitary District, then the time herein fixed for the completion of such part of said work so delayed shall be extended for a period equivalent to the time lost by reason of any of the causes aforesaid; but no such alleyance shall be made unless a claim therefor in writing is presented to the engineer within four days after the commencement of such delay, and it is further expressly agreed that said contractor shall not be entitled to any damages or compensation from the said Sanitary District on account of any delays resulting from any of the causes above specified; said engineer shall decide the number of days that said contractor has been so delayed and his decision shall be final and binding upon both parties hereto."

The counts further aver that on April 6, 1917, the United States declared war on the Imperial German government and that plaintiffs were inevitably and substantially delayed by the prosecution of that war; that on April 9, 1917, plaintiffs notified the engineer of defendant in writing of that fact and asked an extension of time for completion of the contract; that on or about May 1, 1917, defendant, "in a lawful manner" requested plaintiffs give up their right to an extension of time and to suspend operations and promised that if plaintiffs would proceed with the completion of the work, defendant would pay plaintiffs, upon completion of the work, the additional cost over and above the prices promised by the contract; that relying on this promise plaintiffs completed the work September 22, 1917. The 22nd count avers that the additional cost was $22,080, and that the various notices, etc., provided for by the contract were waived by defendant "in a lawful manner," but that the engineer arbitrarily refused to grant a certificate therefor.

The 23d count likewise avers the making of a contract, sets up article 27 thereof verbatim, avers that plaintiffs immediately entered upon the performance of the contract and that they were not in default when the World war broke on August 4, 1914; that the cost of labor, dynamite and other materials were thereby increased; that on August 7th plaintiffs served a written claim upon the

engineer of defendant for an extension of time due to said war obstruction for the completion of the contract as provided in article 27; that on or about September 1,1914, defendant "in a lawful manner" and in response to this claim, requested plaintiffs to give up their right to an extention of time and to give up their right to temporarily suspend the completion of the contract until the removal of the war and the war obstructions and "in a lawful manner" promised to pay plaintiffs if they would proceed with the work the additional cost to plaintiffs caused by the war in addition to the contract prices specified in the contract, and that relying on the promise and good faith of defendant, plaintiffs gave up their right to the extension of time to temporarily suspend, and diligently carried on the work to completion and completed the contract September 22, 1917; that in doing so they incurred losses and damage due to the war and the war conditions following upon the declaration of war, and that this additional cost to plaintiffs over and above the contract price on account of the work done amounted to $188,968.71; that defendant wrongfully and contrary to its promise refused to accept the work at the increased cost, and that the engineer arbitrarily and not in good faith refused to include the increased cost in his certificate; that the various written notices, claims, statements and writings required by the contract to be furnished by the engineer of defendant were "waived by defendant in a lawful manner" as was the provision to complete the work on November 1, 1916, and that the provision in article 27 that plaintiffs should not be entitled to additional damage and compensation on account of said war delay "was waived by defendant in a lawful manner," by means of which defendant became liable.

Plaintiffs contend that the forbearance of their claim of the right to suspend operations until after the war was a sufficient consideration for the allowance of increased cost of performance, and

engineer of defendant for an extension of time to said war obstruction for the completion of the contract as provided in article XV; that on or about September 1,1914, defendant "in a lawful manner" and in response to this claim, requested plaintiffs to give up their right to an extension of time and to give up their right to temporarily suspend the execution of the contract until the removal of the war and the war obstructions and "in a lawful manner" promised to pay plaintiffs if they would proceed with the work the additional cost to plaintiffs caused by the war in addition to the contract price specified in the contract, and that relying on the promise and good faith of defendant, plaintiffs gave up their right to the extension of time to temporarily suspend, and thereafter worked on the work to completion and completed the contract September 30, 1917; that in doing so they incurred costs and expenses due to the non and the war conditions following upon the declaration of war, and that this additional cost to plaintiffs over and above the contract price on account of the war does amount to $[illegible]; that defendant wrongfully and contrary to its promise refused to accept the work at the increased cost, and that on, insofar as material and not in good faith relied to induce the increased cost to the contractor; that the various extensions, claims, or requests for writings required by the contract to be furnished by the engineer of defendant were "waived by defendant in a lawful manner" as permitted provision to complete the work on November 1, 1917, and that the provision in article 7 that plaintiffs should receive and be to additional damage and compensation on account of such delay "was waived by defendant in a lawful manner," by reason of which defendant became liable.

Plaintiffs asserted that the forbearance of their right of the right to suspend operations until after the war was a valid and consideration for the alleged of increased cost of performance, and

that where a municipal corporation has obtained a contract which by reason of changed circumstances has become oppressive on the other party, an agreement to pay additional compensation is not, in the absence of special resolution, unenforceable for want of consideration; that such corporations have the right to settle controversies by compromise rather than by resorting to litigation; that such a corporation, conformable with any statutory limitation, has the power to modify, change or supplement one contract by another; that the trustees of the Sanitary District had power to enter into a special agreement when confronted with the possibility of an indefinite suspension of work; that section 11, paragraph 4294 of the act creating the Sanitary District and requiring publication of the terms and conditions of a contract exceeding the sum of $500, is only intended to secure full and fair competition and to prevent favoritism; that section 90, chapter 42 (Cahill's Ill. Rev. Stats. 1933) gives the board of trustees broad powers in connection with the subject of drainage; that if the work done was within the power of the municipal corporation and the municipal corporation could lawfully make such contract for labor and material, where such labor and material are furnished and accepted by a municipal corporation, it would be estopped from setting up as a defense the irregular and unauthorized manner in which the contract was entered into; that municipal corporations are liable where they have received benefit of labor or materials without any special contract to pay for same, the law implying a promise to pay for what has been received and enjoyed, and that where the corporation has the general power to contract in a proper manner for the labor and material received, it is liable although it may not have followed the proper manner; that counts 22 and 23 show that the work furnished by plaintiffs was pursuant to a situation which amounted to an emergency and was vitally necessary to the continued functioning and existence of de-

vitality necessary to the continued functioning and existence of defendant in a situation which amounted to an emergency and was counts 22 and 23 show that the work furnished by plaintiffs was liable although it may not have followed the proper manner; that strict in a proper manner for the labor and material received, it is joyed, and that where the corporation has the general power to contract for labor or material without any express contract to pay for same, the law implying a promise to pay for what has been received and enjoyed, it would be entirely from equity to be a defense the irregular and unauthorized manner in which the contract was entered into; that municipal corporations are liable where they have received benefit labor and material are furnished and accepted by a municipal corporation, it would be entirely from equity to be a defense the irregular manner in which the contract was entered into; that municipal corporations are liable where they have received benefit of the power of the municipal corporation and the municipal corporation could lawfully make such contract for labor and material, where such

with the subject of franchise; that if the work done was within the power of the municipal corporation and the municipal corporation

parent favoritism; that section 6, chapter 45 (Smith's Ill. Rev. Stats. 1923) gives the board of trustees broad powers in connection

of $800, is only intended to secure full and fair competition and to

section of the terms and conditions of a contract exceeding the sum

of an indefinite succession of work; that section 11, paragraph 4294 of the act creating the Sanitary District and requiring publi-

enter into a special agreement when confronted with the possibility

another; that the trustees of the Sanitary District had power to

has the power to modify, change or supersede one contract by

controversies by compromise rather than by resorting to litigation;

that such a corporation, conformable with any statutory limitation,

consideration; that such corporations have the right to settle

in the absence of special resolution, unauthorized for want of

other party, an agreement to pay additional compensation is not,

by reason of changed circumstances has become oppressive on the

that where a municipal corporation has obtained a contract which

fendant; that a municipality which accepts the benefits of a contract where there was original power to make the contract in effect ratifies the same. Plaintiffs cite, with innumerable other cases, Maher v. City, 38 Ill. 266; City v. E. St. Louis, C. L. & C. Co., 98 Ill. 415; Sexton v. City of Chicago, 107 Ill. 323; Sexton v. City of Chicago, 115 Ill. 230; Badger v. Inlet, 141 Ill. 540; Great Lakes Co. v. City of Chicago, 353 Ill. 614; Village of Harvey v. Wilson, 78 Ill. App. 544; City v. Beck, 93 Ill. App. 70; Westbrook v. Middlecoff, 99 Ill. App. 327, and urge that these cases lay down "the principle that municipal corporations may be held liable for labor and materials furnished in a manner not authorized, if they have the power to contract for such labor and materials, upon the theory of an estoppal."

We deem it quite unnecessary to review in detail these and many other decisions which are cited. The facts set up in these two counts fail to indicate any such emergency as existed in the case of Great Lakes Co. v. City of Chicago, recently decided. There a situation arose which was evidently not within the contemplation of the parties at the time the contract was executed. Here, the situation which arose was clearly within the contemplation of the parties and was expressly provided for by the section of the contract upon which plaintiffs rely. There is no allegation in either of these counts that the matter was ever taken up with the board of trustees of the Sanitary District. The averment that defendant made this alleged additional arrangement "in a lawful manner" is merely a conclusion of the pleader which seems to have been adopted repeatedly and which carries with it the inference that there could be no possible allegation that any additional agreement had ever been entered into with the board of trustees of the district, the only body which could legally pass upon the request or enter into any such agreement with plaintiffs. Even if the contingency of war had not been covered

fendant; that a municipality which accepts the benefits of a contract where there was original power to make the contract in effect ratifies the same. Plaintiffs cite, with innumerable other cases, Mayer v. City, 32 Ill. 290; City v. St. Louis, O. L. & C. Co., 98 Ill. 418; Dexter v. City of Chicago, 107 Ill. 328; Sexton v. City of Chicago, 118 Ill. 320; Barker v. Inlet, 141 Ill. 560; Great Lakes Co. v. City of Chicago, 323 Ill. 616; Village of Harvey v. Wilson, 78 Ill. App. 544; City v. Beck, 93 Ill. App. 70; Westbrook v. Middlecoff, 99 Ill. App. 327, and urge that these cases lay down "the principle that municipal corporations may be held liable for labor and materials furnished in a manner not authorized, if they have the power to contract for such labor and materials, upon the theory of an estoppel."

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by the contract, it is apparent that the Sanitary District would not and could not have obligated itself to pay additional expense arising out of it. 13 Corpus Juris, sec. 714; Columbus Ry. etc. Co. v. Columbus, 253 Fed. 499; City of Moorhead v. Union Light, Heat, etc. Co., 255 Fed. 920; Associated Portland Cement Co. v. William Cory & Son, (England) 31 Times Law Reports 442; L.R. A. 1916 F. 72, note and cases there cited. The bare fact that by reason of the war the performance of the contract was made more difficult, would not discharge plaintiffs from their obligation to complete the work. Thomson v. Thomson, 315 Ill. 521; Commonwealth v. Bader, 271 Pa. 308, 114 Atl. 266; Commonwealth v. Neff, 271 Pa. 312, 114 Atl. 267.

Indeed, there is authority to the effect that even if the legislature of the State had enacted a law permitting the municipal authorities of the Sanitary District to recognize this situation and pay costs occasioned by the war conditions, such statute would be unconstitutional. Davis Construction Co. v. Board of Commissioners, etc., 192 Ind. 144, 132 N. E. 629, 21 A.L.R. 557; Hays v. Board of Commissioners, etc., 136 N. E. 13; Gordon v. New York, 233 N. Y. 1, 134 N. E. 698; Dale Engineering Co. v. State, 186 N.Y.Supp. 490. For the reasons indicated, we think the court did not err in sustaining the general and special demurrer to these two counts.

IV. Plaintiffs argue as to a large number of matters that the court erred in its rulings on the admission and exclusion of evidence. It is objected that upon a cross-examination of the witness John B. Quinn, the court allowed defendant to introduce evidence that was conjectural, speculative and prejudicial, Quinn having testified at length and in detail as to the performance of the contract. He said that the total sum to be paid under the contract as originally made was $495,000, and that plaintiffs had actually received from defendant $643,706.69 for the same as finally performed; that they had completed the job on September 22, 1917; that on October

by the contract, it is apparent that the Sanitary District would not and could not have obligated itself to pay additional expenses arising out of it. 14 Corpus Juris, sec. 714; Columbus Ry. etc. Co. v. Columbus, 245 Ind. 469; City of Bourbonnais v. Union Light, Heat, etc. Co., 258 Ill. 530; Associated Artificial Cement Co. v. William Cory & Son, (England) 31 Times Law Reports 447; L.R. A. 1916 F. 72, note and cases there cited. The bare fact that by reason of the war the performance of the contract was made more difficult, would not discharge plaintiffs from their obligation to complete the work. Thomson v. Thomson, 218 Ill. 321; Commonwealth v. Baker, 271 Pa. 305, 114 Atl. 256; Commonwealth v. Neff, 271 Pa. 312, 114 Atl. 267.

Indeed, there is authority to the effect that even if the legislature of the State had enacted a law permitting the municipal authorities of the Sanitary District to recognize this situation and pay costs occasioned by the war conditions, such statute would be unconstitutional. Davis Construction Co. v. Board of Commissioners, etc., 192 Ind. 144, 132 N. E. 688, 22 L.R.A. 327; Hoya v. Board of Commissioners, etc., 158 N. E. 18; Gordon v. New York, 222 N. Y. 1, 124 N. E. 478; Dale Engineering Co. v. State, 188 N.Y. Supp. 489. For the reasons indicated, we think the court did not err in sustaining the general and special demurrer to these two counts.

IV. Plaintiffs argue as to a large number of matters that the court erred in its rulings on the admission and exclusion of evidence. It is objected that upon a cross-examination of the witness John B. Quinn, the court allowed defendant to introduce evidence that was conjectural, speculative and prejudicial, Quinn having testified at length and in detail as to the performance of the contract. He said that the total sum to be paid under the contract as originally made was $245,000, and that plaintiffs had actually received from defendant $243,708.89 for the same as finally performed; that they had completed the job on September 22, 1917; that on October

19, 1917, they were ready to move off it. The witness was then asked if at his first conversation with Mr. Wisner, the engineer for the district, he had been asked whether if Mr. Wisner had paid his voucher for some $34,000 upon condition that he would sign an unqualified release of the District, he would have accepted the voucher. He replied that it was never offered, and that he could not tell. While a general objection was interposed to the first question on this line, no objection was made to a large number of similar questions, to all of which he answered that he did not know, and that he was "pretty hard up." He said, "Yes, I would today." To these further questions, there was no objection nor motion to strike out his answers. With the record in this condition we hold that the admission of this evidence was not reversible error, for the reason that plaintiffs acquiesced in putting the same in evidence, and they are not now in a position to urge an objection.

Complaint is also made that the court, over objection, permitted the witness Trinkaus, one of the engineers in charge of the work for the District, to testify that the field notes, estimate sheets, computations, etc., were true and correct when as a matter of fact it appeared that other persons had done much of the work in connection with producing them. Plaintiffs urge the general and undoubted rule that a witness will not be allowed to testify to the correctness of the result of the labor of another, and authorities are cited to that effect. The record, however, indicates that defendant's objection to this testimony on this point was sustained by the court.

Similar objection is made as to the testimony of one Curtiss, another engineer for the District, who observed much of the work which had been done on the contract. He testified without objection as to the technical methods used in finding the eleva-

19, 1917, they were ready to move off it. The witness was then asked if at his first conversation with Mr. Wisner, the engineer for the district, he had been asked whether if Mr. Wisner had paid his vouchers for some $36,000 upon condition that he would sign an unqualified release of the District, he would have accepted the voucher. He replied that it was never offered, and that he could not tell. While a general objection was interposed to the first question on this line, no objection was made to a large number of similar questions, to all of which he answered that he did not know, and that he was "pretty hard up." He said, "Yes, I would today." To these further questions, there was no objection nor motion to strike out his answers. With the record in this condition we hold that the admission of this evidence was not reversible error, for the reason that plaintiffs acquiescence in putting the same in evidence, and they are not now in a position to urge an objection.

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Similar objection is made as to the testimony of one Curtiss, another engineer for the District, who observed much of the work which had been done on the contract. He testified without objection as to the technical methods used in finding the eleva-

tions, and that this was done in a manner usually adopted and used by competent engineers. He was asked his opinion as to whether the method employed was proper and replied that he thought it was. The contract under which this work was being done provided that the work should be carried on under the supervision of the chief engineer of the Sanitary District and his properly authorized assistants. The witness testified as he properly might under the circumstances to his own opinion. It was not a mere guess and was, we hold, admissible and competent. 1 Wigmore on Evidence, 2nd ed., p. 1060, sec. 658. The vouchers, as a matter of fact, were based on the measurements, data, etc., collected by the engineers or under their direction, and the decision of the engineers under the terms of the contract was final. The vouchers were accepted by plaintiffs, thus justifying the inference that plaintiffs also were of the opinion that these figures and estimates were worthy of credit.

Plaintiffs also object that a number of photographs which the evidence tended to show actually portrayed different conditions as the work progressed at different times were allowed in evidence without laying a proper foundation by producing the photographer who took the pictures to show the circumstances under which they were made and without accounting for his absence. The attorney for plaintiffs, while the preliminary testimony in this regard was being taken, indicated that he did not wish to be unduly technical and said, "I want these pictures to go to the jury so they may form an intelligent conception, but for the sake of my record---." We think it was not error under the circumstances to admit these pictures. 22 Corpus Juris 917, sec. 1119; C. & E. I. R. R. Co. v. Crose, 214 Ill. 602; Ill. So. Ry. Co. v. Hayer, 225 Ill. 613; Clay v. Aluminum Ore Co., 186 Ill. App. 506; 2 Wigmore on Evidence (2nd ed.), sec. 792, p. 98.

tions, and that this was done in a manner usually adopted and used by competent engineers. He was asked his opinion as to whether the method employed was proper and replied that he thought it was. The contract under which this work was being done provided that the work should be carried on under the supervision of the chief engineer of the sanitary district and his properly authorized assistants. The witness testified as to properly might under the circumstances to his own opinion. It was not a mere guess and was, we hold, admissible and competent. 1 Elmore on Evidence, 2nd ed., p. 1060, sec. 888. The vouchers, as a matter of fact, were based on the measurements, data, etc., furnished by the engineers under their direction, and the testimony of the engineers under the terms of the contract was final. The vouchers were accepted by plaintiffs, thus justifying the inference that plaintiffs also were of the opinion that these figures and estimates were worthy of credit.

Plaintiffs also object that a number of photographs which the evidence tended to show actually portrayed different conditions as the work progressed at different times were allowed in evidence without laying a proper foundation by producing the photographer who took the pictures to show the circumstances under which they were made and without accounting for his absence. The attorney for plaintiffs, while the preliminary testimony in this regard was being taken, indicated that he did not wish to be unduly technical and said, "I want these pictures to go to the jury so they may form an intelligent conception, but for the sake of my record---," we think it was not error under the circumstances to admit these pictures. RR Commrs Jurls 217, sec. 1112; W. S. L. R. Co. v. Crane, 114 Ill. 686; Ill. Co. Ry. Co. v. Dwyer, 2 B Ill. 418; Clay v. Aluminum Co., 198 Ill. App. 306; 2 Wig ore on Evidence (2nd ed.), sec. 792, p. 88.

Complaint is also made that the witness Trinkaus was allowed to state that as the work was done he gave credit for any ledge of limtstone rock taken out at any time during the progress of the work as solid rock. It is urged that this statement by the witness permitted him to invade the province of the jury. Trinkaus, however, was the engineer in charge, and it was he who under the contract would direct what credit should be given in this respect. The question called for an answer as to how and what he did in connection with this work. He was not required to give an answer as to the ultimate question which it was for the jury to decide, and we hold the court did not err in this respect.

Objection is also made that Trinkaus was allowed to testify that the final and monthly estimates and computations as made by him were correct. These particular papers are apparently not in evidence, but if they were the contract provided that the same should be accepted as correct, and the evidence indicates that as a matter of fact, as already stated, plaintiffs actually accepted and kept them.

Plaintiffs also object that a notice served on defendant to produce certain records was received in evidence. No objection was made in this respect at the time the notice was offered. Objection is also made that the engineer, Trinkaus, was permitted to testify as to the cost and ease of laying riprap, and similar objection is made to the testimony of an assistant engineer for the Sanitary District. It is urged that the necessary qualifications were not shown. These witnesses testified at length, and we think it appears from the entire evidence that they were entirely qualified.

Complaint is also made of the admission of a drawing which was introduced during the testimony of engineer Trinkaus, which appears in evidence as defendant's exhibit 26. This exhibit was offered in evidence. Objection was made to it upon the ground that it was self-serving, and the objection was overruled. The witness

Complaint is also made that the witness Trinkaus was allowed to state that as the work was done he gave credit for any judge of Jurisdiction took taken out at any time during the progress of the work as said took. It is urged that this statement by the witness permitted him to invade the province of the jury. Trinkaus, however, was the engineer in charge, and it was he who under the contract would direct what credit should be given in this respect. The question called for an answer as to how and what he did in connection with this work. He was not required to give an answer as to the ultimate question which it was for the jury to decide, and we hold the court did not err in this respect.

Objection is also made that Trinkaus was allowed to testify that the final and monthly estimates and computations as made by him were correct. These particular papers are apparently not in evidence, but if they were the contract provided that the same should be accepted as correct, and the evidence indicates that as a matter of fact, as already stated, plaintiffs actually accepted and kept them.

Plaintiffs also object that a notice served on defendant to produce certain records was received in evidence. No objection was made in this respect at the time the notice was offered. Objection is also made that the engineer, Trinkaus, was permitted to testify as to the cost and wage of laying pipes, and similar objection is made to the testimony of an assistant engineer for the Sanitary District. It is urged that the necessary qualifications were not shown. These witnesses testified at length, and we think it appears from the entire evidence that they were entirely qualified.

Complaint is also made of the admission of a drawing which was introduced during the testimony of engineer Trinkaus, which appears in evidence as defendant's exhibit 36. This exhibit was offered in evidence. Objection was made to it upon the ground that it was self-serving, and the objection was overruled. The witness

described it as follows:

"It is drawn to scale. It represents the two kinds of riprap laid on section 10. On the one side it shows the riprap extending from the original ground on a straight line down to within a few feet of the bottom, and on the other side it shows the riprap extending from the original ground on a one vertical to two horizontal slope to elevation minus 4 and thence on a 1-on-1 slope to a proper bench. It correctly represents the two characters of riprap, one the character that was put in the original contract and the other the character of the changed slope."

The document was admissible under the authority of Reinke v. Sanitary District, 260 Ill. 380; Smith v. Sanitary District, 260 Ill. 453; Central Ill. Public Service Co. v. Deterding, 331 Ill. 277. The exhibit was not offered as independent evidence but was allowed to go the jury as illustrating the evidence upon which the jury was to pass.

It is urged that the court erred in permitting the witness to state that his computations were based on data received and that he did not make the same with any ulterior motive; that he did not act arbitrarily or with any such motive in his classification of the material excavated as glacial drift or solid rock. In view of the provisions of the contract and the duties of the engineer for the Sanitary District thereunder, and also in view of the charges made in the declaration as to the arbitrary action of the engineer, it was not erroneous, we think, to permit him to so state.

It is further objected that Trinkaus was permitted to state what would have happened to certain concrete work had it been placed at a certain elevation, instead of that at which it was placed. It is urged that a witness may not testify as to his conjectures and suppositions. The evidence was given by way of explanation of the reasons why the engineer had not directed this concrete to be constructed in a certain place and at an elevation of minus 20. He explained that the reason was that the substructure and the superstructure were so great that a slide might have occurred. This explanation was given, while witness was testifying as to the condition

described it as follows:

"It is drawn to scale. It represents the two kinds of rip-rap laid on section 10. On the one side it shows the riprap extending from the original ground on a straight line down to within a few feet of the bottom, and on the other side it shows the riprap extending from the original ground on a one vertical to two horizontal slope to elevation minus 4 and thence on a 1-on-1 slope to a proper bench. It correctly represents the two characters of rip-rap, one the character that was put in the original contract and the other the character of the changed slope."

The document was admissible under the authority of Hadley v. Sanitary District, 260 Ill. 336; Smith v. Sanitary District, 280 Ill. 433; Central Ill. Public Service Co. v. Grennan, 331 Ill. 277. The exhibit was not offered as independent evidence but was allowed to go to the jury as illustrating the evidence upon which the jury was to pass.

It is urged that the court erred in permitting the witness to state that his computations were based on data received and that he did not make the same with any interior motive; that he did not act arbitrarily or with any ulterior motive in his classification of the material excavated as glacial drift or solid rock. In view of the provisions of the contract and the duties of the engineer for the Sanitary District thereunder, and also in view of the charges made in the declaration as to the arbitrary action of the engineer, it was not erroneous, we think, to permit him to do so.

It is further objected that Tomkins was permitted to state what would have happened to certain concrete work had it been placed at a certain elevation, instead of that at which it was placed. It is urged that a witness may not testify as to his conjectures and suppositions. The evidence was given by way of explanation of the reasons why the engineer had not directed this concrete to be constructed in a certain place and at an elevation of minus 8. He explained that the reason was that the substructure and the superstructure were so great that a slide might have occurred. This explanation was given, while witness was testifying as to the condition

of the limestone at what was known as the 48th avenue bridge. He said that it consisted of tilted layers; that the "laminations in the limestone sloped toward the center line of the channel" and that at minus 23½ C. C. D., two feet below the bottom of the channel they had a "toe." We think this evidence did not invade the province of the jury.

It is urged that too much latitude was given in the cross-examination of plaintiffs' witness Shnable. This witness had testified in detail as to conditions at the time the contract was executed and as to conditions at different times as the work progressed. The latitude to be allowed in the cross-examination is a matter in the discretion of the trial judge, who in this case we think did not abuse his discretion. Chicago Union Traction Co. v. Miller, 212 Ill. 49; 40 Cyc., 2508. The record is quite voluminous and the objections numerous, and we hold there was no reversible error in the admission and exclusion of evidence.

V. It is next urged that the court erred in excluding proper evidence offered in behalf of plaintiffs. Complaint is made that the court sustained objection by defendant to the evidence given by Mr. Quinn of the plaintiff firm to the effect that in a conversation between him and Wisner, the chief engineer of the District, he told Wisner that "his boring notes were all wrong." The objection of defendant to this evidence was stated to be that it was irrelevant and incompetent under the pleadings. The evidence discloses that a profile of the borings as made by the Sanitary District hung on the walls of the office, and as appears from Mr. Quinn's testimony, he had seen it there and Trinkaus frequently examined it as the work progressed. This profile was not produced by defendant, and plaintiffs, though thus aware of its existence, made no effort to have it produced. This evidence had no direct bearing on any issue raised under the pleadings and was not important, we think, one way

of the lineature at what was known as the 46th avenue bridge. He said that it consisted of tilted layers; that the "laminations in the lineature sloped toward the center line of the channel" and that at minus 25½ C. G. D., two feet below the bottom of the channel they had a "toe." We think this evidence did not invade the province of the jury.

It is urged that too much latitude was given in the cross-examination of plaintiffs' witness Smable. This witness had testified in detail as to conditions at the time the contract was executed and as to conditions at different times as the work progressed. The latitude to be allowed in the cross-examination is a matter in the discretion of the trial judge, who in this case we think did not abuse his discretion. Chicago Union Traction Co. v. Miller, 212 Ill. 49; 40 Cyc., 2008. The record is quite voluminous and the objections numerous, and we hold there was no reversible error in the admission and exclusion of evidence.

V. It is next urged that the court erred in excluding proper evidence offered in behalf of plaintiffs. Complaint is made that the court sustained objection by defendant to the evidence given by Mr. Quinn of the plaintiff firm to the effect that in a conversation between him and Wisner, the chief engineer of the District, he told Wisner that "his boring notes were all wrong." The objection of defendant to this evidence was stated to be that it was irrelevant and incompetent under the pleadings. The evidence disclosed that a profile of the borings as made by the Sanitary District hung on the walls of the office, and as appears from Mr. Quinn's testimony, he had seen it there and frequently examined it as the work progressed. This profile was not produced by defendant, and plaintiffs, though aware of its existence, made no effort to have it produced. This evidence had no direct bearing on any issue raised under the pleadings and was not important, we think, one way

or the other. We hold it was not reversible error to exclude it.

Complaintis also made that evidence of plaintiff Shnable tending to show that under the direction of defendant's engineers plaintiffs were obliged to remove much more solid rock than estimated in the original proposal, was excluded. Shnable testified that the amount of such solid rock was approximately 53,000 cubic yards and that its removal was made necessary by the fact that the engineers ordered the slopes to be recut after the same had been practically finished. He testified that the progress of the work was reported to him from day to day by the timekeeper and his partner, Quinn, and that he had computed from a series of 24 drawings showing the slopes designed, redesigned and finished. The witness said he made the computations and that they were true and correct; that he made the drawings from the reports made to him and that these drawings were true and correct. Defendant made objection to these drawings and this testimony upon the theory that in the first place the evidence did not establish that the amounts computed were correct and, in addition, that the exhibits offered were wholly immaterial under the issues. The evidence of Shnable disclosed a lack of personal knowledge of the data which appeared on the sheets, and for that reason, as well as the further reason that the evidence was wholly immaterial under the terms of the contract, we think the court properly excluded it.

Complaint is made that the court excluded evidence offered by plaintiffs as to the reasonable cost of removing the excess of solid rock as found over the estimate, contract and plans. They offered to show such cost to be 86 cents per cubic yard, whereas the unit price as provided for under the terms of the contract was only 69 cents per cubic yard. The proofs in evidence showed that 306,459 cubic yards of this material had been removed by January 31, 1916, and that on December 31, 1916, the amount which had been

or the other. He held it was not reversible error to exclude it.

Complaintiff also made that evidence of plaintiff Shanklin tending to show that under the direction of defendant's engineers plaintiffs were obliged to remove much more solid rock than specified in the original proposal, was excluded. Shanklin testified that the amount of such solid rock was approximately 33,000 cubic yards and that its removal was made necessary by the fact that the engineers ordered the slopes to be recut after the same had been practically finished. He testified that the progress of the work was reported to him from day to day by the timekeeper and his partner, Quinn, and that he had computed from a series of 24 drawings showing the slopes designed, redesigned and finished. The witness said he made the computations and that they were true and correct; that he made the drawings from the reports made to him and that these drawings were true and correct. Defendant made objection to these drawings and this testimony upon the theory that in the first place the evidence did not establish that the amounts computed were correct and, in addition, that the exhibits offered were wholly immaterial under the issues. The evidence of Shanklin displayed a lack of personal knowledge of the data which appeared on the sheets, and for that reason, as well as the further reason that the evidence was wholly immaterial under the terms of the contract, we think the court properly excluded it.

Complaint is made that the court excluded evidence offered by plaintiffs as to the reasonable cost of removing the excess of solid rock as found over the estimate, contract and plans. They offered to show such cost to be 98 cents per cubic yard, whereas the unit price as provided for under the terms of the contract was only 50 cents per cubic yard. The proofs in evidence showed that 300,192 cubic yards of this material had been removed by January 31, 1916, and that on December 31, 1916, the amount which had been

removed was 554,710 cubic yards. A final estimate voucher showed that the amount had on September 27, 1917, increased to 570,552.3 cubic yards, although no additional excavations had been made. The question as asked referred to the number of cubic yards removed from January 6, 1916, up to September, 1917, so that it is apparent that the dates as indicated by the question were incorrect. Moreover, the technical formalities were not complied with as to the offer of proof. 64 Corpus Juris 130, sec. 149; Chicago City Ry. Co. v. Carroll, 206 Ill. 318; Strong v. Friedman, 261 Ill. App. 602. We hold there was no reversible error in this ruling.

VI. At the close of all the evidence upon defendant's motion the court excluded all the evidence bearing on counts 4, 5 and 6 and instructed the jury to find for defendant as to these counts. Plaintiffs contend that this was error. They point out (and correctly) that upon such motion the court is limited strictly to determining whether there is no evidence legally tending to prove the facts as alleged in plaintiffs' declaration or the particular counts of it. These particular counts declared for compensation for pumping the channel prism during the winter of 1916 to 1917. Section 84 of the contract provided:

"The Contractor shall provide all necessary pumping machinery and operate the same. The excavated channel must be maintained dry by the Contractor until November 1, 1916, or until the completion of all work under this contract if completed after that date, without extra charge therefor.

"Pumping plats must be maintained and operated until November 1, 1916, or until the completion of this contract if completed after that date.***

"All pumping and disposal of water (except during the additional twelve months' period of extra pumping hereinbefore specified) shall be performed by the Contractor without extra charge therefor."

The evidence also discloses that on October 11, 1916, plaintiffs wrote the chief engineer of the defendant Sanitary District as follows:

"We expect to practically complete the excavation work of Section 10 Channel before the freezing weather sets in. As the

removed was 334,710 cubic yards. A final estimate vouchers showed that the amount had on September 27, 1917, increased to 370,322.3 cubic yards, although no additional excavations had been made. The question as asked referred to the number of cubic yards removed from January 6, 1916, up to September, 1917, so that it is apparent that the dates as indicated by the question were incorrect. Moreover, the technical formalities were not complied with as to the offer of proof. 64 Corpus Juris 1(3), sec. 149; Chicago City Ry. Co. v. Carroll, 206 Ill. 318; Strong v. Friedman, 251 Ill. App. 602. We hold there was no reversible error in this ruling.

VI. At the close of all the evidence upon defendant's motion the court excluded all the evidence bearing on counts 4, 5 and 6 and instructed the jury to find for defendant as to those counts. Plaintiffs contend that this was error. They point out (and correctly) that upon such motion the court is limited strictly to determining whether there is no evidence legally tending to prove the facts as alleged in plaintiffs' declaration or the particular counts of it. These particular counts declared for compensation for pumping the channel prism during the winter of 1916 to 1917. Section 24 of the contract provided:

"The Contractor shall provide all necessary pumping machinery and operate the same. The excavated channel must be maintained dry by the Contractor until November 1, 1916, or until the completion of all work under this contract if completed after that date, without extra charge therefor.

"Pumping plate must be maintained and operated until November 1, 1916, or until the completion of this contract if completed after that date.***

"All pumping and disposal of water (except during the additional twelve months' period of extra pumping hereinafter specified) shall be performed by the Contractor without extra charge therefor."

The evidence also disclosed that on October 11, 1916, plaintiffs wrote the chief engineer of the defendant Sanitary District as follows:

"We expect to practically complete the excavation work of Section 10 Channel before the freezing weather sets in. As the

laying of the Rip Rap Slope Paving necessarily follows the channel excavation, we find that this part of the work will be thrown into the coming winter.

"As the foundation for the Rip Rap must be prepared by hand upon the Glacial Drift, it becomes impractical to lay up work of this character on frozen ground and be assured of its permanent maintenance with any degree of certainty.

"We would, therefore, be pleased, upon investigation and to your entire satisfaction, that you recommend to the Honorable Board of Trustees the temporary postponement of this work and that it be done during suitable weather next year.

"In consideration of an order to this effect, we agree to complete Section 10 on or before August 1st, 1917, that we will maintain the Rip Rap and pump Section 10 during this period free of cost to the Sanitary District, and, that we will not hold the Sanitary District liable on account of granting us such an order.

"An early reply will be very much appreciated."

As defendant points out, while the substructure of the 48th avenue bridge was made heavier, plaintiffs received payment at $8.44 per cubic yard for 1907 cubic yards instead of the estimated amount of 800 cubic yards, and the bridge itself considered separately from protections and foundations, was constructed as originally designed, with the exception of the concrete base for hand rails and pylons, and was paid for on a lump sum basis. Wingwalls were put in for protection and the foundations made heavier, and plaintiffs were paid for the excavation, for putting in these walls, for going to the additional depth for the foundations, and for putting in the concrete. The character of the work as a whole was not changed, and the evidence tends to show that plaintiffs acquiesced in all these changes, and that it was only after the contract had been completed that they conceived the idea that there had been any prejudicial change in the character of the work. There was no evidence from which the jury could reasonably find that there had been a change in the general character of the contract because of any changes requested or required by the engineers, and there are no facts in the record from which a jury could reasonably find that the defendant district was obligated to pay on account of the matter of pumping set forth in these counts.

The same statement may be made, we think, as to the complaint

laying of the Rip Rap Slope having necessarily follows the channel excavation, we find that this part of the work will be thrown into the coming winter.

"As the foundation for the Rip Rap must be prepared by hand upon the Glacial Drift, it becomes impractical to lay up work of this character on frozen ground and be assured of its permanent maintenance with any degree of certainty.

"We would, therefore, be pleased, upon investigation and to your entire satisfaction, that you recommend to the Honorable Board of Trustees the temporary postponement of this work and that it be done during suitable weather next year.

"In consideration of an order to this effect, we agree to complete Section 10 on or before August 1st, 1917, that we will maintain the Rip Rap and pump station 10 during this period free of cost to the Sanitary District, and, that we will not hold the Sanitary District liable on account of granting us such an order.

"An early reply will be very much appreciated."

As defendant points out, while the substructure of the 48th avenue bridge was made heavier, plaintiffs received payment at $8.44 per cubic yard for 1907 cubic yards instead of the estimated amount of 600 cubic yards, and the bridge itself considered separately from protections and foundations, was constructed as originally designed, with the exception of the concrete base for hand rails and pylons, and was paid for on a lump sum basis. Stingwalls were put in for protection and the foundations made heavier, and plaintiffs were paid for the excavation, for putting in these walls, for going to the additional depth for the foundations, and for putting in the concrete. The character of the work as a whole was not changed, and the evidence tends to show that plaintiffs acquiesced in all these changes, and that it was only after the contract had been completed that they conceived the idea that there had been any preliminary change in the character of the work. There was no evidence from which the jury could reasonably find that there had been a change in the general character of the contract because of any changes requested or required by the engineers, and there are no facts in the record from which a jury could reasonably find that the defendant district was obligated to pay on account of the matter of pumping set forth in these counts.

The same statement may be made, we think, as to the complaint

of plaintiffs that the court also instructed in favor of defendant as to count 18 which was also based upon the theory that changes ordered had amounted to a change of the character of the work as a whole, by the alteration of the double slope above minus four from a one on two and below minus four to the bottom of the channel, a one on one to a continuous slope of approximately one on one and a half. At any rate, this claim could not be allowed as extra work, because it had not been ordered in writing as provided by the terms of the contract. Joliet Bridge & Iron Co. v. East Side Levee & Sanitary District, 210 Ill. App. 575; 66 A. L. R. 693 (note.) Moreover, the engineer would have had no authority to waive this provision.

The court also at the close of all the evidence directed a verdict for defendant as to count 14. This count was declared on a claim for interest upon the theory that the Sanitary District had wilfully and vexatiously withheld payments when due. There is no evidence in the record indicating that any money had been wilfully and vexatiously withheld from plaintiffs. Conway v. City of Chicago, 237 Ill. 128, upon which plaintiffs rely, was distinguishable in that it is a case involving a suit for a claim for bonds which drew interest but which was not paid. The general rule is that a municipal corporation is not chargeable with interest on claims against it in the absence of an express agreement. City of Peoria v. Fruin Bambrick Construction Co., 169 Ill. 36; Smith v. County of Logan, 284 Ill. 163. The court did not err by withdrawing these counts from the jury.

VII. Plaintiffs in the next place contend that the court erred many times in giving instructions to the jury requested by defendant, also in refusing instructions requested by plaintiffs, and in modifying other instructions submitted by plaintiffs and giving them as modified. Plaintiffs complain as to 23 instructions and make many criticisms of them.

of plaintiffs that the court also instructed in favor of defendant as to count IX which was also based upon the theory that changes ordered had amounted to a change of the character of the work as a whole, by the alteration of the double slope above elbow from from a one on two and below elbow from 1½ to the bottom of the channel, a one-on one to a continuous slope of approximately one on one and a half. At any rate, this claim could not be allowed as extra work, because it had not been created in writing as provided by the terms of the contract. Relief Drilling & Line Co. v. East Side Levee & Sanitary District, 20 Ill. App. 270; 46 A. L. R. 694 (Dec.); Moreover, the engineer would have had no authority to waive this provision.

The court also at the close of all the evidence directed a verdict for defendant as to count IX. This count was predicated on a claim for interest upon the theory that the sanitary district had wrongfully and vexatiously withheld payments when due. There is no evidence in the record indicating that any money had been wrongfully and vexatiously withheld from plaintiffs. Weaver v. City of Chicago, 297 Ill. 128, upon which plaintiffs rely, was distinguishable in that it is a case involving a suit for a claim for monies which drew interest but which was not paid. The general rule is that a municipal corporation is not chargeable with interest on claims against it in the absence of an express agreement. City of Joliet v. Joliet Bridge Construction Co., 169 Ill. 27; Smith v. Town of Lyons, 274 Ill. 165. The court did not err in withdrawing these counts from the jury.

VII. Plaintiffs in the next place contend that the court erred many times in giving instructions to the jury requested by defendant, also in refusing instructions requested by plaintiffs, and in modifying other instructions submitted by plaintiffs and giving them as modified. Plaintiffs complain as to 20 instructions and make many criticisms of them.

By defendant's instruction 7 the court told the jury in substance that if it found that plaintiffs had paid for all the rock excavated in the section, for all the glacial drifts excavated at the unit price, then as to the claim of plaintiffs' additional excavation of solid rock and of glacial drift, if any, it should find the issues for defendant. By instruction 8 a similar rule was laid down for claim for riprap, and plaintiffs argue that both instructions were erroneous. They say that the instruction as to the glacial drift and rock ignored the issue as to the excess amount of solid rock removed over the estimate and the amount claimed by plaintiffs for recutting the slopes; also that the instruction ignored paragraph 82 of the contract which concerned the matter of protection of the work, while it was being done, and provided that material should be deposited in a completely excavated section of the channel without negligence of the contractor, and that the contractor upon compliance with certain conditions might be paid for removing same "the unit price per cubic yard herein specified for Excavation of Glacial Drift."

We do not think these instructions were erroneous when considered in connection with the terms and provisions of the contract. Nowhere does the contract speak of a lump sum to be paid for any service or material plaintiffs might provide. Everything was to be paid for according to the unit price, and these instructions informed the jury that if it believed that such payments had been made according to these terms of the contract, the finding as to particular items should be for defendant. The instructions were not peremptory as to the ultimate issue to be decided by the jury concerning the amounts due plaintiffs, but only in each case as to the particular item specified. It may be that an instruction for defendant with respect to these particular items would have been justified under the evidence.

By defendant's instruction 7 the court told the jury in substance that if it found that plaintiffs had paid for all the rock excavated in the section, for all the glacial drift excavated at the unit price, then as to the claim of plaintiffs' additional excavation of solid rock and of glacial drift, if any, it should find the issues for defendant. By instruction 8 a similar rule was laid down for claim for riprap, and plaintiffs argue that both instructions were erroneous. They say that the instruction as to the glacial drift and rock ignored the issue as to the excess amount of solid rock removed over the estimate and the amount claimed by plaintiffs for resetting the slopes; also that the instruction ignored paragraph 52 of the contract which concerned the matter of protection of the work, while it was being done, and provided that material should be deposited in a completely excavated section of the channel without negligence of the contractor, and that the contractor upon compliance with certain conditions might be paid for removing same "the unit price per cubic yard herein specified for Excavation of Glacial Drift."

We do not think these instructions were erroneous when considered in connection with the terms and provisions of the contract. Nowhere does the contract spare of a lump sum to be paid for any service or material plaintiffs might provide; everything was to be paid for according to the unit price, and these instructions informed the jury that if it believed that such payments had been made according to these terms of the contract, the finding as to particular items should be for defendant. The instructions were not peremptory as to the ultimate issue to be decided by the jury concerning the amounts due plaintiffs, but only in each case as to the particular item specified. It may be that an instruction for defendant with respect to these particular items would have been justified under the evidence.

Apparently the trial court allowed the case to go to the jury upon the theory that there was some evidence from which the jury might possibly find that changes made in the character of the work done were so material as to amount to "a general change in character of the work as a whole." We think the court was generous to plaintiffs in this respect, for we find no evidence from which the jury could reasonably conclude that the kind of improvement made was different from that contemplated by the parties at the time of the execution of the contract.

Defendant's given instructions 9, 13 and 22 are criticized because the jury was instructed that the contract provided that the engineer for the Sanitary District should determine all questions in relation to the work and construction, and that his estimates and decisions should be final and conclusive and a condition precedent to the right of plaintiffs to receive compensation, unless the jury found that the engineer went outside of the contract and made a decision which was "arbitrary, capricious, unreasonable, fraudulent, or not in good faith." The criticism of plaintiffs seems to be that these instructions did not tell the jury that the decision of the engineer would not be binding unless he gave notice to plaintiffs and an opportunity to be heard before making his decision. The decision of the engineer would be prima facie correct and binding, and it would be for plaintiffs to allege and prove any fraud or mistake in it. The provision of the contract was valid in this State as it is in most states, (see note to Zimmerman v. Marymor, 54 A. L. R. 1255) unless there is fraud or mistake amounting to fraud, and there is no evidence in this record which would have justified such finding. There was, we think, no error in these instructions.

Complaint is also made of defendant's given instruction 10, because the court told the jury that though it believed the changes

Apparently the trial court allowed the case to go to the jury upon the theory that there was some evidence from which the jury might possibly find that changes made in the character of the work done were so material as to amount to "a general change in character of the work as a whole." We think the court was generous to plaintiffs in this respect, for we find no evidence from which the jury could reasonably conclude that the kind of improvement made was different from that contemplated by the parties at the time of the execution of the contract.

Defendant's given instructions 9, 13 and 22 are criticized because the jury was instructed that the contract provided that the engineer for the Sanitary District should determine all questions in relation to the work and construction, and that his estimates and decisions should be final and conclusive and a condition precedent to the right of plaintiffs to receive compensation, unless the jury found that the engineer went outside of the contract and made a decision which was "arbitrary, capricious, unreasonable, fraudulent, or not in good faith." The criticism of plaintiff's seems to be that these instructions did not tell the jury that the decision of the engineer would not be binding unless he gave notice to plaintiffs and an opportunity to be heard before making his decision. The decision of the engineer would be prima facie correct and binding, and it would be for plaintiffs to allege and prove any fraud or mistake in it. The provision of the contract was valid in this State as it is in most states, (see note to Alexander v. Harvey, 24 A. L. R. 1235) unless there is fraud or mistake amounting to fraud, and there is no evidence in this record which would have justified such finding. There was, we think, no error in these instructions.

Complaint is also made of defendant's given instruction 10, because the court told the jury that though it believed the changes

in the specifications and plans were made and that such changes increased the quantity of work actually done and if it believed that such changes were not such that the general character of the work as a whole was thereby changed, then as to such additional work plaintiffs could recover only at the unit price for such additional work actually performed, and that if plaintiffs had been paid for such additional work at the unit price, they could not recover on their claim for additional work in that respect. Plaintiffs argue that this instruction was erroneous because it ignored the limits of the power of the engineer in making changes and implied that there could be no recovery unless the "whole character of the work is changed," and failed to state what sort of a change that would be, thus leaving the jury in doubt as to the meaning of the words "general character of the work as a whole." It is said that the tendency was to confuse and mislead the jury and that the instruction should have explained the meaning of the phrase "change in the character of the work as a whole." The brief of plaintiffs does not suggest what explanation should have been given of this phrase, nor did they offer any proper instruction which might have made its meaning clearer to the jurors. Moreover, article 6 of the contract provided with reference to extras that "the engineer shall fix such prices for the work as he shall consider just and equitable, and the contractor shall abide by such prices, provided he enters upon such work with a full knowledge of the prices so fixed by said engineer." Moreover, there would be no extras unless "such work has been ordered by the engineer in writing," and there is no evidence that the engineer made any such order. At any rate, any such order for more than $500 would have been illegal by reason of section 11 of the statute creating the Sanitary District. We hold that there was no reversible error in any of these instructions given at the request of

in the specifications and plans were made and that such changes increased the quantity of work actually done and it believed that such changes were not such that the general character of the work as a whole was thereby changed, then as to such additional work plaintiffs could recover only at the unit price for such additional work actually performed, and that if plaintiffs had been paid for such additional work at the unit price, they could not recover on their claim for additional work in that respect. Plaintiffs argue that this instruction was erroneous because it ignored the limits of the power of the engineer in making changes and implied that there could be no recovery unless the "whole character of the work is changed," and failed to state what sort of a change that would be, thus leaving the jury in doubt as to the meaning of the words "general character of the work as a whole." It is said that the tendency was to confuse and mislead the jury and that the instruction should have explained the meaning of the phrase "change in the character of the work as a whole." The brief of plaintiffs does not suggest what explanation should have been given of this phrase, nor did they offer any proper instruction which might have made its meaning clearer to the jurors. Moreover, article 6 of the contract provided with reference to extras that "the engineer shall fix such prices for the work as he shall consider just and equitable, and the contractor shall abide by such prices, provided he orders such work with a full knowledge of the prices so fixed by said engineer." Moreover, there would be no extra unless "such work has been ordered by the engineer in writing," and there is no evidence that the engineer made any such order. At any rate, any such order for more than $300 would have been illegal by reason of section 11 of the statute creating the Sanitary District. We hold that there was no reversible error in any of these instructions given at the request of

defendant.

As to the instructions requested by plaintiffs and refused, criticism is made on account of the refusal to give No. 3, by which the jury was told in substance that plaintiffs were not required to prove that there was actual bad faith or intention on the part of the engineer to commit a fraud; that it was enough to imply bad faith that his estimate and classification were so grossly erroneous as to amount to a fraud; that if the jury believed from a preponderance of the evidence that the engineer's estimate and classification of the materials excavated were grossly erroneous, or that the engineer disregarded important and obvious facts in so estimating and classifying the materials excavated, or used a method of measuring which would result in a great discrepancy in his vouchers and figures as to the kinds and amounts of the various materials excavated, then the jury should find the measurements, estimates and classifications by the engineer were fraudulent and not binding on plaintiffs. Plaintiffs contend, citing authorities, that they were entitled to have the jury instructed on their theory of the case, and insist that there was evidence in the record which would require the court to give this instruction. They say that there was evidence which tended to show that there was a controversy between the engineer and plaintiff Quinn as to the top of solid rock; that the engineer took his cross-section measurements, after the rock was excavated, from traces of the rock sticking out in the slopes, and that the action of the heavy bucket destroyed and mounded over the rock ledges sticking out of the slopes; that the spillage from the bucket coming up the slope hid the trace of the rock from view; that the engineer did not dig into the slopes to find the ledges that had been covered but insisted on taking the ledges that were exposed in the slope, which had to be over a foot thick in order to avoid being broken off by the heavy bucket. They state that there was

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also evidence tending to show that Quinn offered and volunteered to dig into the slopes for the engineer and find the true top of rock, but that this offer was refused; and that the evidence also tended to show that the chief engineer approved of taking the top of rock in cross-sectioning after it had been removed and stated they could get the rock from the slopes; that Mr. Quinn and the chief engineer had an argument about this method; that this argument occurred in 1914 after the limestone ledges had been removed; that Quinn insisted that the cross-section measurements be taken before the rock was drilled, blasted and removed, and just as it lay in the bed of the channel; that the chief engineer finally yielded and cross-sectioned before excavation of the rock, and that Quinn then went ahead and removed the solid rock, which he had previously refused to do. Plaintiffs also say that the evidence of Trinkaus tended to show that the monthly measurements were merely estimates, all subject to a final measurement at the end, but that there is no evidence that a final survey or check-up on the rock was made, and that this could not be done, as the slopes were riprapped east of the temporary road a distance of about 3,900 feet. They therefore argue that there was evidence that the engineer had used wrong methods and ignored the obvious facts and that the instruction should have been given for this reason. It is urged that since there was no other instruction properly presenting plaintiffs' theory of the case, it was prejudicial error to refuse it. As defendant contends, the instruction was argumentative in its nature and would have permitted the jury to go outside the contract in determining and classifying the materials excavated. The facts as related of the differences between plaintiffs and the chief engineer with reference to the manner of competition do not indicate action which was arbitrary, capricious, unreasonable or fraudulent, and that being so, it would have been error for the court to give

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this instruction.

Complaint is likewise made of the refusal to give plaintiffs' instruction 6, by which the jury was told that if the engineer refused to pass on any questions relating to the work when properly requested by plaintiffs, then the jury should find that such refusal was wilful and not binding on plaintiffs, and that plaintiffs were excused from satisfying the condition precedent. It is argued in support of this objection that the evidence indicated that the engineer had failed to pass on plaintiffs' claim for extras. Under the terms of this contract, however, as already pointed out, there were no extras not paid for. It was necessary that the order for such extras should be given in writing, but this was not done, and the jury would have no right to thus disregard the terms of the contract.

Complaint is made that the court refused to give plaintiffs' requested instruction 7, by which the jury was told that it was only changes of a minor or incidental character that the engineer might fix the value of, and that if the jury believed from the evidence that defendant's engineer ordered changes in the work which plaintiffs complied with, and they were of a minor or incidental character, and that the engineer failed and refused to value and allow for any extra work caused by the minor changes, and that the refusal was arbitrary, wilful, and not the exercise of the engineer's independent judgment, then the jury should fix and allow the value of the extra work, if any, at cost, plus 15 per cent for profit, superintendence and use of tools. This instruction, too, was properly refused, in that it was an endeavor to change the provisions of the contract which did not permit recovery on this basis for changes of a minor or incidental character, and as we have already said, there is no proof in the record as to any extras which were not paid for.

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quested instruction 8, by which the jury was told that if it believed that the final certificate of the engineer was to be given to defendant and not to plaintiffs and that the certificate was for the sole benefit of defendant, then the jury should find that plaintiffs were not required to obtain the final certificate before being entitled to any sums of money, if any were due plaintiffs under the contract. It is said that the contract is silent as to whom the certificate should be delivered; that if it was intended to be delivered to plaintiffs the contract should have so stated; that the certificate seemed to be for the guidance and information of defendant and to aid and protect it in making payments; that in this particular case the evidence tended to show that the final certificate was given to defendant by the engineer; that this conduct amounted to a construction placed on the contract by defendant through its agents and from it could be argued that the proper construction and inference were that the final certificate was to be delivered to defendant, and not to plaintiffs. Plaintiffs therefore contend that if the certificate was for the sole benefit of defendant, plaintiffs were under no duty to obtain the certificate. The contract specifically provided that "the engineer's estimate and decision shall be final and conclusive; and such estimate and decision in case any question shall arise, shall be a condition precedent to the right of said contractor to receive any money or compensation for anything done or furnished under this contract." This plain provision of the contract seems to make further discussion of this question unnecessary. 44 Corpus Juris, sec. 2584, p. 386; 54 A. L. R. 1256, note and cases cited; Bernique v. Arnold, 33 Ill. App. 303; Classen v. Davidson, 59 Ill. App. 106; Gilmore v. Courtney, 158 Ill. 432.

Plaintiffs also complain that instruction 9 was refused, but it has been disapproved by the Supreme and Appellate courts in

quested instruction 8, by which the jury was told that if it believed that the final certificate of the engineer was to be given to defendant and not to plaintiffs and that the certificate was for the sole benefit of defendant, then the jury should find that plaintiffs were not required to obtain the final certificate before being entitled to any sum of money, if any were due plaintiffs under the contract. It is said that the contract is silent as to when the certificate should be delivered; that if it was intended to be delivered to plaintiffs the contract should have so stated; that the certificate seemed to be for the guidance and information of defendant and to aid and protect it in making payments; that in this particular case the evidence tended to show that the final certificate was given to defendant by the engineer; that this conduct amounted to a construction placed on the contract by defendant through its agents and from it could be argued that the proper construction and inference were that the final certificate was to be delivered to defendant, and not to plaintiffs. Plaintiffs therefore contend that if the certificate was for the sole benefit of defendant, plaintiffs were under no duty to obtain the certificate. The contract specifically provided that "the engineer's estimate and decision shall be final and conclusive; and such estimate and decision in case any question shall arise, shall be a condition precedent to the right of said contractor to receive any money or compensation for anything done or furnished under this contract." This plain provision of the contract seems to make further discussion of this question unnecessary. 44 Corpus Juris, sec. 2984, p. 388; 84 A. L. R. 1266, note and cases cited; Berrigan v. Arnold, 32 Ill. App. 303; Gleason v. Davidson, 89 Ill. App. 104; Gilmore v. Courtney, 158 Ill. 452.

Plaintiffs also complain that instruction 9 was refused, but it has been disapproved by the Supreme and Appellate courts in

numerous cases. Riddle v. Ransager, 254 Ill. App. 68; Lindenberger v. Klapp, 254 Ill. App. 192; Teter v. Spooner, 305 Ill. 198; Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207.

Complaint is also made in regard to requested instruction 11, by which plaintiffs requested an instruction that if the jury believed that plaintiffs were required to have the written order from the engineer for extra work and were to report same in writing at time furnished and at end of month in which furnished to engineer, and further believe that the engineer was also required to put the order for the extra work in writing but did not do so but orally ordered the extra work and plaintiffs performed the same, then the jury should find defendant was estopped from relying on the want of the written order for the extra work performed, if any, and the written report by plaintiffs to the engineer and the written order from the engineer to plaintiffs were waived by defendant. As already said, there is no evidence in this case that there was any extra work within the meaning of the terms of the contract not paid for, and there being no such work the engineer could not have waived a written order for the same. Moreover, the engineer would have been without authority to waive it unless authorized by the board of trustees or by the contract. 66 A. L. R. 686, note and cases cited; Kann v. Bennett, 82 Atl. (Pa.) 1111; Gammino v. Inhabitants of Town of Dedham, 164 Fed. 593.

Complaint is also made by plaintiffs as to the action of the court in modifying instructions requested by them and giving them as modified. In particular complaint is made of instruction 2, by which the jury was told that if it believed that defendant made changes in the work and required plaintiffs to do extra work, and that these changes were of a major character and changed the character of the work as a whole, the jury might allow plaintiffs additional compensation in addition to the unit price, according

numerous cases. Middle v. Kammerer, 324 Ill. App. 68; Lindenberger v. Hixon, 224 Ill. App. 102; Yeiser v. Spooner, 305 Ill. 108; Kelvin v. Chicago Rapid Transit Co., 287 Ill. 527.

Complaint is also made in regard to requested instruction 11, by which plaintiffs requested an instruction that if the jury believed that plaintiffs were required to have the written order from the engineer for extra work and were to recover same in writing at time furnished and at end of month in which furnished to engineer, and further believe that the engineer was also required to put the order for the extra work in writing but did not do so but orally ordered the extra work and plaintiffs performed the same, then the jury should find defendant was estopped from relying on the want of the written order for the extra work performed, if any, and the written report by plaintiffs to the engineer and the written order from the engineer to plaintiffs were waived by defendant. As already said, there is no evidence in this case that there was any extra work within the meaning of the terms of the contract not paid for, and there being no such work the engineer could not have waived a written order for the same. Moreover, the engineer would have been without authority to waive it unless authorized by the board of trustees or by the contract. 60 A. L. R. 680, note and cases cited; Kaye v. Kennedy, 82 Ill. App. (2d.) 1111; Dunning v. Inhabitants of Town of Dedham, 164 Ind. 302.

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to the terms of the contract and as shown by the evidence. The instruction as originally offered contained a statement that in such case the jury might disregard the engineer's decision. This was contrary to the terms of the contract and it was not error to eliminate it.

By other offered instructions plaintiffs requested the court to tell the jury that if the engineer had made changes of a major character and changed the work as a whole and plaintiffs had furnished extra labor and materials, it might then disregard the provisions of the contract requiring the engineer to order the same in writing. The court eliminated that part of the instruction which attempted to define the meaning of the clause in the contract with reference to changing the character of the work as a whole. We think there was no reversible error in this as the instruction offered did not accurately state this provision of the contract.

Plaintiffs argue that the judgment should be reversed because, it is said, the trial Judge went into the jury room after the cause was submitted to the jury and orally instructed the jury about the case. It is urged that this was a violation of plaintiffs' right to trial by jury as established by a long line of decisions of the Supreme court, beginning with Fisher v. People. 23 Ill. 218, and ending with People v. Brothers, 347 Ill. 530. The facts as disclosed by the record appear to be that upon the hearing of the motion for a new trial the Judge stated:

"I want to say something for the record that I did to the jury that I want to tell counsel about. They called me in there. They had a verdict prepared, 'We, the jury find--.' When the form of verdict was submitted to the jury I asked the counsel for the defendant and said, 'Inasmuch as you owe 1,000 and some odd dollars, it was only consistent that I submit one verdict: 'We, the jury, find the issues for the plaintiffs and assess the plaintiffs' damages at blank dollars,' and a place for the twelve jurors to sign. I submitted that form. I came back to the chambers that evening while the jury was deliberating. They said they wanted to speak to me. Well, I went in, and they showed me the form of verdict that said, 'We, the jury, find the issues for the plaintiff and we assess the

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"I want to say something for the record that I did go to the jury box I want to tell counsel about. They called me in to me. They had a verdict prepared, 'We, the jury find--.' When the form of verdict was submitted to the jury I asked the counsel for the defendant and said, 'Immediate as you owe 1,100 and some odd dollars, it was only sensible that I submit one verdict: 'We, the jury, find the issues for the plaintiffs and assess the plaintiffs' damages at three dollars,' and a place for the twelve jurors to sign. I submitted that form. I came back to the courtroom that evening while the jury was deliberating. They said they wanted to come to me. Well, I went in, and they showed me the form of verdict that said, 'We, the jury, find the issues for the plaintiff and we assess the

plaintiffs' damages at nothing.' The foreman said, 'That doesn't sound quite right. We can't hardly find the issues for the plaintiffs and assess the damages at nothing. The defendant admitted that he owes a thousand and some odd dollars. Do we have to put that in there for him to get it, or is that paid anyway? Is that paid independently of this verdict?' I said, 'No, inasmuch as the defendant admits that he owes the thousand and some odd dollars, that must be in the verdict,' so they wrote it in. That's all I said. I want the counsel for the plaintiffs to know that. I realize it is very questionable whether a Court should say anything to a jury in the absence of representation by both sides, but I felt, of course, that verdict was absolutely wrong, and it was based upon a misconception, and I straightened them out on that."

Upon receiving this information plaintiffs took an exception which appears in the record and argue error in this court. There is no doubt of the rule that it is error for a trial judge to participate in any way in the deliberations of the jury. The facts here, however, do not indicate that the Judge in any way interfered with the deliberations of the jury. The jury had apparently reached its verdict and brought that verdict into the presence of the Judge. The verdict did not have to be in writing. It could be pronounced orally, and it was not improper practice for the Judge to assist the jury in putting the verdict at which they had arrived into proper form. The deliberations of the jury were not interfered with, and while it would have been wise for the trial Judge to have delayed his explanation to the foreman of the jury until such time as counsel for the parties might be summoned, it was not in our opinion even technical error for him to give the assistance to the jury which it requested after having arrived at its verdict.

Plaintiffs also argue quite at length error on account of alleged improper remarks made by counsel for defendant. The attorney for the District referred to the fact that plaintiffs were men of mature age and of fine reputations, and urged that this should not affect the verdict. Incidentally, he referred to the fact that his own hair was gray and that he had grown old in the public service and that he anticipated rewards in another world. His possible future rewards were, of course, wholly immaterial to

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any issue of the case, but no objection was made, and we think it fair to presume that an intelligent jury was not in any way misled. It is not usual for courts to discourage eloquence of attorneys in the absence of an objection by the opposing party.

This cause has been pending for many years. The trial seems to have been one that was eminently fair, and after a careful consideration of the 19 divisions, with many subdivisions, of plaintiffs' voluminous brief, we hold the opinion that the judgment entered is the only one that could be permitted to stand. The record is voluminous. The briefs of plaintiffs consist of more than 200 printed pages. Substantial justice has been attained and the judgment should therefore be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

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AFFIRMED.

O'Connor and McNurlin, JJ., concur.

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37014

JOHN T. WHITLOCK, doing business as CHEROKEE REMEDY COMPANY,
Appellant,

v.

CHEROKEE MEDICINE COMPANY, a corporation, JOSEPH P. MORRIS, AGNES R. MORRIS, ROBERT DAVIS TRIBBLE and JOSEPH W. MORRIS, Impleaded,
Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

275 I.A. 635

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff, John T. Whitlock, doing business as the Cherokee Remedy Company, seeks to reverse an order of the Circuit court sustaining the general and special demurrer of defendants, Cherokee Medicine Company, a corporation, Joseph P. Morris, Agnes R. Morris, Robert Davis Tribble and Joseph W. Morris, to his second amended bill of complaint as amended, (hereinafter referred to as the bill) which sought to enjoin defendants from using the name Cherokee Medicine Company, from doing business under the name of Cherokee Medicine Company, and from using the name "Cherokee" in connection with the description, display, advertising or sale of any of their medicinal products or preparations.

The material allegations of the bill are substantially that plaintiff is now and since 1914 has been engaged in the manufacture, sale and distribution of medicinal preparations in the city of Chicago, under the name and style of the Cherokee Remedy Company; that in the year 1925 his business had expanded

37014

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By this appeal plaintiff, John T. Whitlock, doing business as the Cherokee Remedy Company, seeks to reverse an order of the Circuit court enjoining the general and special demurrer of defendants, Cherokee Medicine Company, a corporation, Joseph P. Morris, Agnes R. Morris, Robert Davis Tribble and Joseph W. Morris, to his second amended bill of complaint as amended, (hereinafter referred to as the bill) which sought to enjoin defendants from using the name Cherokee Medicine Company, from doing business under the name of Cherokee Medicine Company, and from using the name "Cherokee" in connection with the description, display, advertising or sale of any of their medicinal products or preparations.

The material allegations of the bill are substantially that plaintiff is now and since 1914 has been engaged in the manufacture, sale and distribution of medicinal preparations in the city of Chicago, under the name and style of the Cherokee Remedy Company; that in the year 1923 his business had expanded

to such an extent that he constructed a building to meet his needs and moved into same; that by hard work, honest dealing and the expenditure of large sums of money for advertising purposes since the establishment of his business, the demand for his products increased so that he has done and is now doing a large business throughout the United States and foreign countries; that his business is now worth considerably more than $100,000; that it has always been conducted under the name and style of the Cherokee Remedy Company, and that the name Cherokee Remedy Company, and the good will thereto attached, has become a very valuable asset to him; that he is the owner of a secret formula for the manufacture of a tonic known as "Whitlock's Special;" that this fact has become known generally to the public and is responsible for a great amount of the good will attached to the name of Cherokee Remedy Company; that he has expended thousands of dollars in advertising his products and in establishing the integrity of the name Cherokee Remedy Company, and as a result of the general satisfaction given to the users of his products, he is in receipt of a large number of letters advising him of the benefits derived therefrom; that he has established and maintained a printing department and issues a small magazine known as "The Little Cherokee Visitor," wherein his products are described and advertised and the trade name Cherokee Remedy Company carried to the public and wherein various of the letters received from users of his products are printed from time to time; that the principal assets of his business are the trade name Cherokee Remedy Company, with the good will thereto attached, and the trade secret for the manufacture of Whitlock's Special; that the products manufactured and distributed by him are, (1) Whitlock's Special, (2) Whitlock's U-Car-Gl, (3) Whitlock's Permangol, (4) Whitlock's Ointment, (5)

to such an extent that he constructed a building to meet his needs and moved into same; that by hard work, honest dealing and the expenditure of large sums of money for advertising purposes since the establishment of his business, the demand for his products increased so that he has done and is now doing a large business throughout the United States and foreign countries; that his business is now worth considerably more than $100,000; that it has always been conducted under the name and style of the Cherokee Remedy Company, and that the name Cherokee Remedy Company, and the good will thereto attached, has become a very valuable asset to him; that he is the owner of a secret formula for the manufacture of a tonic known as "Hilliock's Special;" that this fact has become known generally to the public and is responsible for a great amount of the good will attached to the name of Cherokee Remedy Company; that he has ex-under numerous of follows in advertising his products and in establishing the integrity of the name Cherokee Remedy Company, and as a result of the general satisfaction given to the users of his products, he is in receipt of a large number of letters advising him of the beneficial derived therefrom; that he has established and maintained a printing department and issues a small magazine known as "The Little Cherokee Visitor," wherein his products are described and advertised and the trade name Cherokee Remedy Company carried to the public and wherein various of the letters received from users of his products are printed from time to time; that the principal assets of his business are the trade name the Cherokee Remedy Company, with the good will thereto attached, and the trade secret for the manufacture of Hilliock's Special; that the products manufactured and distributed by him are, (1) Hilliock's Special, (2) Hilliock's U-Gar-Ol, (3) Hilliock's Ferment, (4) Hilliock's Ointment, (5)

Whitlock's Hair Application and (8) Whitlock's C. C. C.; that all of such products have been manufactured and distributed under the name Cherokee Remedy Company since 1914, and that to his knowledge no person, firm or corporation other than plaintiff and defendant corporation, has ever used the name Cherokee in connection with the manufacture, sale or distribution of medicinal properties.

The bill further alleged that during a part of the year 1930, Joseph W. Morris, one of the defendants, was employed by the Cherokee Remedy Company and thereby identified himself to plaintiff's trade and to the public generally as an authorized distributer of Cherokee Remedies; that, as such distributor, Joseph W. Morris discovered the popularity of Cherokee Remedies and also the names of a great many of plaintiff's customers, which otherwise would not have been obtainable by him; that, as such distributor, he established his headquarters at his home, 10219 South Green street, Chicago, and without the knowledge or consent of plaintiff, and in order to profit and benefit from plaintiff's advertising and reputation, caused his residence address to be listed in the Chicago Telephone Directory as the "Cherokee Remedy Company, South Side Branch;" that Joseph W. Morris severed his connection with the Cherokee Remedy Company, December 8, 1930, and on January 6, 1931, in the name and guise of defendant Joseph P. Morris, his son, together with defendants Agnes R. Morris, his wife, and Robert Davis Tribble, organized a corporation under the name of the Cherokee Medicine Company, with its principal office at 10219 South Green street, and since that time has engaged in the manufacture of medicinal preparations; that included in the products now manufactured by defendants and placed before the public by the Cherokee Medicine Company are, (1) Cherokee Tonic,

Whitlock's Hair application and (8) Whitlock's C. C. C.; that all of such products have been manufactured and distributed under the name Cherokee Remedy Company since 1919, and that to his knowledge no person, firm or corporation other than plaintiff and defendant corporation, has ever used the name Cherokee in connection with the manufacture, sale or distribution of medicinal properties.

The bill further alleged that during a part of the year 1930, Joseph W. Morris, one of the defendants, was employed by the Cherokee Remedy Company and thereby identified himself to plaintiff's trade and to the public generally as an authorized distributor of Cherokee Remedies; that, as such distributor, Joseph W. Morris discovered the popularity of Cherokee Remedies and also the names of a great many of plaintiff's customers, which otherwise would not have been ascertainable by him; that, as such distributor, he established his headquarters at his home, 10819 South Green street, Chicago, and without the knowledge or consent of plaintiff, and in order to profit and benefit from plaintiff's advertising and reputation, caused his telephone address to be listed in the Chicago Telephone Directory as the "Cherokee Remedy Company, South Side Branch;" that Joseph W. Morris severed his connection with the Cherokee Remedy Company, December 6, 1930, and on January 6, 1931, in the name and guise of defendant Joseph P. Morris, his son, together with defendants Irene M. Morris, his wife, and Robert Davis Fitzsim, organized a corporation under the name of the Cherokee Medicine Company, with its principal office at 10819 South Green street, and since that time has engaged in the manufacture of medicinal preparations; that included in the products now manufactured by defendants and placed before the public by the Cherokee Medicine Company are, (1) Cherokee Tonic,

(2) Cherokee Salve, (3) Cherokee Liniment, (4) Cherokee Gargleyou, (5) Cherokee Regulators, (6) Cherokee Cough Syrup, (7) Cherokee Pile Ointment and (8) Cheretone Laxative; that it was the intention of defendants before and at the time of the selection of the name Cherokee Medicine Company, to select and use the name Cherokee to defraud plaintiff in the use of such name and to defraud and mislead the public into believing that defendants' preparations were those of the Cherokee Remedy Company, and to gain for themselves and the Cherokee Medicine Company, by unfair means and unfair competition, the customers and business of plaintiff; that defendants have adopted and are using the name Cherokee Medicine Company in order to secure to themselves the fame and benefit of plaintiff's trade name, Cherokee Remedy Company, and the good will thereto attached, and in order to confuse the public and plaintiff's customers into believing that defendants' products are the products of plaintiff; that defendants are now and have been engaged in the manufacture, sale and distribution of a medicinal preparation under the name of Cherokee Tonic, and that such preparation is offered to the public in containers of a kind and size similar to those in which plaintiff's tonic, Whitlock's Special, is put out; that the containers used by defendants bear labels upon which appear directions and other statements similar to the directions and descriptive matter contained on the labels of plaintiff's tonic; that the color of defendants' preparations has been made to simulate the color of plaintiff's products, all of which has been done by defendants for the purpose of deceiving the public and customers of plaintiff into believing that the products of defendants are those of plaintiff; that defendants are now advertising their products as Cherokee Remedies and that the demand for defendants' products is created by reason of the fact that the public and customers of plaintiff have been

(2) Cherokee Salve, (3) Cherokee Liniment, (4) Cherokee Sarsaparilla, (5) Cherokee Regulators, (6) Cherokee Cough Syrup, (7) Cherokee Pile Ointment and (8) Cherokee Laxative; that it was the intention of defendants before and at the time of the selection of the name Cherokee Medicine Company, to select and use the name Cherokee to defraud plaintiff in the sale of such name and to deceive and mislead the public into believing that defendants' preparations were those of the Cherokee Remedy Company, and to gain for themselves and the Cherokee Medicine Company, by unfair means and unfair competition, the customers and business of plaintiff; that defendants have adopted and are using the name Cherokee Medicine Company in order to secure to themselves the fame and benefit of plaintiff's trade name, Cherokee Remedy Company, and the good will thereto attached, and in order to confuse the public and plaintiff's customers into believing that defendants' products are the products of plaintiff; that defendants are now and have been engaged in the manufacture, sale and distribution of a medicinal preparation under the name of Cherokee Tonic, and that such preparation is offered to the public in containers of a kind and also similar to those in which plaintiff's tonic, Kickapoo's Special, is put out; that the containers used by defendants bear labels upon which appear directions and other statements similar to the directions and descriptive matter contained on the labels of plaintiff's tonic; that the color of defendants' preparations has been made to simulate the color of plaintiff's products, all of which has been done by defendants for the purpose of deceiving the public and customers of plaintiff into believing that the products of defendants are those of plaintiff; that defendants are now advertising their products as Cherokee Remedies and that the demand for defendants' products is created by reason of the fact that the public and customers of plaintiff have been

deceived and are being deceived by defendants into believing that defendants' products are genuine Cherokee Remedy products, whereas said products are not manufactured in accordance with plaintiff's formulas and are spurious and gross counterfeits of plaintiff's products; that defendants are causing to be published and distributed a small magazine called "The Cherokee," which is similar in size and other respects to the magazine published by plaintiff called "The Little Cherokee Visitor" and that defendants advertise their products in it as "Cherokee Remedies;" that defendants' magazine contains a number of letters purporting to come from users of defendants' products, whereas many of such letters are from persons who have used the products of plaintiff, all of which has been done by defendants for the purpose of deceiving the public and customers of plaintiff into believing that the products advertised therein are genuine Cherokee Remedy products and are the products of plaintiff, and for the purpose of palming off on the public as genuine Cherokee Remedies the spurious counterfeit products of defendants.

The bill further alleged that by the fraudulent use of the name "Cherokee," defendants are causing plaintiff irreparable loss and damage; that because of the misrepresentations of defendants, prospective customers of plaintiff have purchased products of the defendant corporation in the mistaken belief that they were purchasing products manufactured by plaintiff; and that because of the inferiority of the products of defendant corporation, customers have been and will be deterred from dealing with plaintiff in the future; that because defendants are palming off, selling and distributing grossly inferior products to the public as Cherokee Remedies, at supposedly reduced prices, the public is caused to misjudge plaintiff's products and therefore to refuse to do

deceived and are being deceived by defendants into believing that defendants' products are genuine Cherokee remedy products, whereas said products are not manufactured in accordance with plaintiff's formulas and are spurious and gross counterfeits of plaintiff's products; that defendants are claiming to be publishing and distributed a small magazine called "The Cherokee," which is similar in size and other respects to the magazine published by plaintiff called "The Little Cherokee Visitor" and that defendants advertise their products in it as "Cherokee Remedies"; that defendants' magazine contains a number of letters purporting to come from users of defendants' products, whereas many of such letters are from persons who have used the products of plaintiff, all of which has been done by defendants for the purpose of misleading the public and customers of plaintiff into believing that the products advertised therein are genuine Cherokee remedy products and are the products of plaintiff, and for the purpose of palming off on the public as genuine Cherokee remedies the spurious counterfeit products of defendants.

The bill further alleges that by the fraudulent use of the name "Cherokee," defendants are causing plaintiff irreparable loss and damage; that because of the misrepresentations of defendants, prospective customers of plaintiff have purchased products of the defendant corporation in the mistaken belief that they were purchasing products manufactured by plaintiff; and that because of the inferiority of the products of defendant corporation, customers have been and will be deterred from dealing with plaintiff in the future; that because defendants are palming off, selling and distributing grossly inferior products to the public as Cherokee remedies, as supposedly reduced prices, the public is caused to mistrust plaintiff's products and therefore to refuse to do

business with plaintiff; that the name Cherokee Medicine Company, was adopted by defendants for the sole purpose and with the fraudulent intent of diverting business from plaintiff by deceiving the public and customers of plaintiff into believing that business done with defendants was in reality being done with plaintiff; and that he has suffered in his good name, reputation and good will to the extent of more than $20,000. The bill prayed that defendants be enjoined from using the name Cherokee Medicine Company, from operating and doing business under the name Cherokee Medicine Company, from using and displaying the name Cherokee as a name for, or in any manner to describe or designate, any of their medicinal products or preparations, from displaying the name Cherokee in connection with any of their medicinal products or preparations, and from advertising or representing any product or article prepared and manufactured by or for them to be the product of or indorsed by or made in accordance with any formula belonging to plaintiff.

Defendants' general demurrer was in the usual form and in their special demurrer they alleged (1) that plaintiff in conducting his business as the Cherokee Remedy Company, is using the name of a nationally known Indian tribe or Indian district and that under the law he could not have the exclusive use of such name when applied to well known articles of commerce, such as remedies; (2) that, inasmuch as plaintiff concedes that he sells his articles as Whitlock's Special, Whitlock's U-Gar-Gl, Whitlock's Permangol, Whitlock's Ointment, Whitlock's Hair Application and Whitlock's C. C. C., and that the defendant corporation, Cherokee Medicine Company, sells its products as Cherokee Tonic, Cherokee Salve, Cherokee Liniment, Cherokee Garglsyou, Cherokee Regulators, Cherokee Cough Syrup, Cherokee Pile Ointment and Cherotone

business with plaintiff; that the name Cherokee Medicine Company, was adopted by defendants for the sole purpose and with the fraudulent intent of diverting business from plaintiff by deceiving the public and customers of plaintiff into believing that business done with defendants was in reality being done with plaintiff; and that he has suffered in his good name, reputation and good will to the extent of more than $20,000. The bill prayed that defendants be enjoined from using the name Cherokee Medicine Company, from operating and doing business under the name Cherokee Medicine Company, from using and displaying the name Cherokee as a name for, or in any manner to describe or designate, any of their medical products or preparations, from displaying the name Cherokee in connection with any of their medicinal products or preparations, and from advertising or representing any product or article manufactured and marketed by or for them to be the product of or in demand by or made in accordance with any formula belonging to plaintiff.

Defendants' general demurrer was in the usual form and in their special demurrer they alleged (1) that plaintiff in conducting his business as the Cherokee Remedy Company, i. using the name of a nationally known Indian tribe as an Indian district and that under the law he could not have the exclusive use of such name when applied to well known articles of commerce, such as remedies; (2) that, inasmuch as plaintiff concedes that he sells his articles as Hilloch's Special, Hilloch's Kidney-Cure, Hilloch's Permangol, Hilloch's Ointment, Hilloch's Hair Preparation and Hilloch's C. C. C., and that the Indiana corporation, Cherokee Medicine Company, sells its products as Cherokee Cough Cure, Cherokee Salve, Cherokee Liniment, Cherokee Tablets, Cherokee Pain Pills, Cherokee Cough Syrup, Cherokee Pile Ointment and Cherotone

Laxative, the public could not be deceived in the purchase of one article believing it was the other; (3) that plaintiff admits that his trade name is not incorporated under the laws of the State of Illinois, or of any other state, and that the State of Illinois has "franchised" to the defendant corporation, the Cherokee Medicine Company, a name of which it has the exclusive use; (4) that plaintiff conducts his business as John T. Whitlock, doing business as the Cherokee Remedy Company, manufacturer of Whitlock's Remedies, and that the defendant corporation, the Cherokee Medicine Company, manufactures Cherokee Medicines, and that no deception could possibly be practiced on the buying public; and (5) that no pecuniary damage is stated in the bill.

Plaintiff's theory is that defendants fraudulently adopted the name Cherokee in order to defraud him and to deceive the public into believing the products of the Cherokee Medicine Company to be the products of the Cherokee Remedy Company; that defendants are and have been deceiving the public and customers of plaintiff by the fraudulent adoption and use of the name "Cherokee" and by dressing their products to imitate the products of plaintiff; that such conduct and dealing by defendants should be enjoined by a court of equity, inasmuch as plaintiff is now, and has been since 1914, selling his medicinal remedies under the name of the Cherokee Remedy Company; and that by the expenditure of large sums of money in advertising his products under the name Cherokee Remedy Company and by the general satisfaction given to the users of his products, the name "Cherokee" has been given a secondary meaning in connection with the manufacture of medicinal preparations, no person, firm or corporation other than plaintiff ever having used the name "Cherokee" in connection with the sale of medicinal properties prior to defendants' use of same.

laxative, the public could not be deceived in the purchase of one article believing it was the other; (3) that plaintiff admits that his trade name is not incorporated under the laws of the State of Illinois, or of any other state, and that the State of Illinois has "franchised" to the defendant corporation, the Cherokee Medicine Company, a name of which it has the exclusive use; (4) that plaintiff continues his business on John T. Milsap, doing business as the Cherokee Remedy Company, manufacturer of Milsap's Remedies, and that the defendant corporation, the Cherokee Medicine Company, manufactures Cherokee Medicines, and that no deception could possibly be practiced on the buying public; and (5) that no pecuniary damage is stated in the bill.

Plaintiff's theory is that defendants fraudulently adopted the name Cherokee in order to defraud him and to deceive the public into believing the products of the Cherokee Medicine Company to be the products of the Cherokee Remedy Company; that defendants are and have been deceiving the public and customers of plaintiff by the fraudulent adoption and use of the name "Cherokee" and by drawing their products to imitate the products of plaintiff; that such conduct and dealing by defendants should be enjoined by a court of equity, inasmuch as plaintiff is poor, and has been since 1914, selling his medicinal remedies under the name of the Cherokee Remedy Company; and that by the expenditure of large sums of money in advertising his products under the name Cherokee Remedy Company and by the general distribution given to the name of his products, the name "Cherokee" has been given a secondary meaning in connection with the manufacture of medicinal preparations, no person, firm or corporation other than plaintiff ever having used the name "Cherokee" in connection with the sale of medicinal preparations prior to defendants' use of same.

Defendants' theory is that the name Cherokee could not be exclusively appropriated by plaintiff since it is the name of a nationally known Indian tribe or Indian district; that, inasmuch as plaintiff is doing business as the Cherokee Remedy Company, manufacturer of Whitlock's Remedies, and that defendant Cherokee Medicine Company is the manufacturer of Cherokee Remedies, the buying public could not possibly be deceived by its name; that plaintiff is not incorporated, while defendant company is incorporated under the laws of the State of Illinois and therefore has been exclusively empowered to use the name Cherokee Medicine Company, and that no damage has been shown by plaintiff.

The law seems to be so well settled as to hardly require the citation of authority that a court of equity will protect one in the use of a name to which he has given a reputation against another who adopts the same or a similar name for the purpose of unfair competition. A dealer coming into a field already occupied by a rival of established reputation must do nothing which will unnecessarily create confusion between his goods or business and the goods or business of his rival. Owing to the nature of the goods dealt in, or the common use of terms which are publici juris, some confusion and damage may be inevitable, but anything done which unnecessarily increases this confusion and damage to the established trader constitutes unfair competition. The unnecessary imitation or adoption of a confusing name, label, or dress of goods constitutes unfair competition. Where there is no reason for using a particular name other than to trade upon another's good will, such use of the name constitutes unfair competition and will be enjoined. (63 Corpus Juris, page 412.)

In affirming the granting of an injunction in a cause where plaintiffs were coal merchants engaged in business at 22

Defendants' theory is that the name Cherokee could not be exclusively appropriated by plaintiff since it is the name of a nationally known Indian tribe or Indian district; that, inasmuch as plaintiff is doing business as the Cherokee Beauty Company, manufacturer of Hillock's Remedies, and that defendant Cherokee Medicine Company is the manufacturer of Cherokee Remedies, the buying public could not possibly be deceived by its name; that plaintiff is not incorporated, while defendant company is incorporated under the laws of the State of Illinois and therefore has been exclusively empowered to use the name Cherokee Medicine Company, and that no damage has been shown by plaintiff.

The law seems to be so well settled as to hardly require the citation of authority that a court of equity will protect one in the use of a name to which he has given a reputation against another who adopts the name or a similar name for the purpose of unfair competition. A description of a trade already occupied by a rival of established reputation made in making which will necessarily create confusion between the goods or business of the rival. Owing to the nature of the goods dealt in, or the common use of terms which are purely juris, some confusion and damage may be inevitable, but anything done which unnecessarily increases this confusion and damage to the established trader constitutes unfair competition. The unnecessary imitation or adoption of a confusing name, label, or dress of goods constitutes unfair competition. Where there is no reason for using a particular name other than to trade upon another's good will, such use of the same constitutes unfair competition and will be enjoined. (Corpus Juris, page 414.)

In affirming the granting of an injunction in a case where plaintiffs were coal merchants engaged in business in Ia

Pall Mall, London, under the name of The New Guinea Coal Company, and defendant, a former employee of plaintiffs, established himself in business at 46 Pall Mall under the name of The Pall Mall Guinea Coal Company, it was held in the English case of Lee v. Halley, L. R. 5, Ch. App. cas. 155, 161-2:

"I quite agree that they (the plaintiffs) have no property in the name; but the principle upon which the cases on the subject proceed is, not that there is property in the word, but that it is a fraud on a person who has an established trade and carries it on under a given name, that some other person should assume the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name. * * * I think this injunction has been properly granted upon the well known principles of this court, which are applicable to all cases of this description, viz., that it is a fraud on the part of a defendant to set up business under such a designation as is calculated to lead, and does lead, other people to suppose that his business is the business of another person."

In Johnson Manufacturing Co. v. Johnson Skate Co., 313 Ill. 106, where plaintiff, the Nestor Johnson Manufacturing Company, manufactured tubular ice skates and defendant, Alfred Johnson Skate Company, was later organized and entered into competition with plaintiff by manufacturing the same kind of skates, and it appeared that the name "Johnson" was associated in the trade and public mind with tubular skates, the court said at pages 118-9:

"The law restricted them only to the extent that they were forbidden to get the complainant's business by unfair competition, by palming off their products as the products of the complainant or by appropriating the reputation of the complainant's goods to their own use. Their first act was the selection of a name for their corporation. Every name was open to them to choose, and the name 'Johnson' was associated in the trade and public mind with tubular skates. They chose that name and called their corporation 'The Alfred Johnson Skate Company.' The result naturally to be expected was that their skates would be considered Johnson skates, and that result followed."

It is needless to cite additional authorities on the proposition that a court will enjoin a defendant who has adopted a similar name for his business for the purpose of deceiving the public into believing that his products are those of another. Every case cited in the briefs of both parties to this cause,

Pall Mall, London, under the name of The New Guinea Coal Company, and defendant, a former employee of plaintiffs, established himself in business at 66 Pall Mall under the name of The Pall Mall Guinea Coal Company. It was held in the English case of Lee v. Neilly, L. R. 8, Ch. App. cas. 128, 131-2:

> "I quite agree that they (the plaintiffs) have no property in the name; but the principle upon which the cases on the subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established trade and carries it on under a given name, that some other person should assume the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name. * * * I think this injunction has been properly granted upon the well known principles of this court, which are applicable to all cases of this description, viz., that it is a fraud on the part of a defendant to set up business under such a designation as is calculated to lead, and does lead, other people to suppose that his business is the business of another person."

In Johnson Manufacturing Co. v. Johnson Stain Co., 318 Ill. 108, where plaintiff, the Mastor Johnson Manufacturing Company, manufactured tubular ice shaker and defendant, Alfred Johnson Stain Company, was later organized and entered into competition with plaintiff by manufacturing the same kind of shaker, and it appeared that the name "Johnson" was associated in the trade and public mind with tubular shaker, the court said at pages 118-9:

> "The law restricted them only to the extent that they were forbidden to get the complainant's business by unfair competition, by palming off their products as the products of the complainant or by appropriating the reputation of the complainant's goods to their own use. Their first act was the selection of a name for their corporation. Every name was open to them to choose, and the name 'Johnson' was associated in the trade and public mind with tubular shaker. They chose that name and called their corporation 'The Alfred Johnson Stain Company.' The result naturally to be expected was that their shaker would be considered Johnson shaker, and that result followed."

It is needless to cite additional authorities on the proposition that a court will enjoin a defendant who has adopted a similar name for his business for the purpose of deceiving the public into believing that his products are those of another.

Every case cited in the briefs of both parties to this cause,

and the authorities generally, recognize this as an established principle of law.

Defendants concede that the law is as heretofore set forth under a proper showing of unfair competition, but insist that upon the properly pleaded facts as they affirmatively appear from the allegations of the bill in the instant case, only such facts being admitted by the demurrer, the doctrine of unfair competition is inapplicable to the case at bar. Defendants also attempt to differentiate this cause on the ground that all of plaintiff's products being sold under the name "Whitlock" and defendants' products being sold under the name "Cherokee," no possible confusion to the public or harm to plaintiff's business could have resulted.

We are of the opinion, after a careful examination and consideration of the admitted facts, that plaintiff's name "Whitlock" and the "Cherokee Remedy Company," under which name he operated, were so inseparably coupled and interwoven in the conduct of his business that any deception and fraud that militated against the Cherokee Remedy Company was bound to result in injury and damage to plaintiff.

The most significant facts in the record are the employment by plaintiff of defendant Joseph W. Morris as a distributor of plaintiff's products, his listing in the Chicago Telephone Directory without plaintiff's knowledge or consent of his home address as the place of business of the "South Side Branch, Cherokee Remedy Company," his leaving the employ of plaintiff, the almost immediate incorporation of the "Cherokee Medicine Company," with his wife and son and another as its stockholders, the establishment of the place of business of the "Cherokee Medicine Company" at the Morris home address, which Joseph W. Morris had held forth as the

and the authorities generally, recognize this as an established principle of law.

Defendants concede that the law is as heretofore set forth under a proper showing of unfair competition, but insist that upon the properly pleaded facts as they affirmatively appear from the allegations of the bill in the instant case, only such facts being admitted by the demurrer, the doctrine of unfair competition is inapplicable to the case at bar. Defendants also attempt to differentiate this case on the ground that all of plaintiff's products being sold under the name "Hilloon" and defendants' products being sold under the name "Sharpoke," no possible confusion to the public or harm to plaintiff's business could have resulted.

We are of the opinion, after a careful examination and consideration of the admitted facts, that plaintiff's name "Hilloon" and the "Sharpoke Remedy Company," under which name he operated, were so inseparably coupled and interwoven in the conduct of his business that any deception and fraud that militated against the Sharpoke Remedy Company was bound to result in injury and damage to plaintiff.

The most significant facts in the record are the employment by plaintiff of defendant Joseph W. Morris as a distributor of plaintiff's products, his living in the Chicago "slaughter-house" without plaintiff's knowledge or consent of his home address as the place of business of the "South Side Branch, Sharpoke Remedy Company," his leaving the employ of plaintiff, the almost immediate incorporation of the "Sharpoke Medicine Company," with his wife and son and another as its stockholders, the establishment of the place of business of the "Sharpoke Medicine Company" at the Morris home address, which Joseph W. Morris had held forth as the

"South Side Branch, Cherokee Remedy Company," the publication by defendants of a small magazine called "The Cherokee" to advertise their products as "Cherokee Remedies," which was similar to a magazine published by plaintiff under the name "The Little Cherokee Visitor," and the simulation of plaintiff's products by defendants as to color, kind and size of container, and descriptive matter on the labels.

While the bill contained some allegations that were merely conclusions and therefore not admitted by the demurrer, the above and many other material facts heretofore set forth were affirmatively and properly pleaded and they demonstrate abundantly and conclusively that the organization of the "Cherokee Medicine Company" by the individual defendants, and its and their entire purpose and course of dealing were calculated to and did of necessity deceive the public into dealing with the "Cherokee Medicine Company" under the belief that it was the "Cherokee Remedy Company," which had been long established and enjoyed a favorable reputation because of the character and quality of its products.

It is urged as a special cause of demurrer that "Cherokee" is the designation of a nationally known Indian tribe or Indian district and that under the law plaintiff could not have the exclusive use of such name when applied to well known articles of commerce, such as remedies. It is sufficient answer to this contention to state that whenever persons engaging in business, intentionally or otherwise, take advantage of the similarity of the name adopted by them to the one under which another had been carrying on his business to mislead the public into the belief that the two establishments were one and the same, they violate the lawful rights of the latter and the plainest principles of

"South Side Brands, Cherokee Remedy Company," the publication by defendants of a small magazine called "The Cherokee" to advertise their products as "Cherokee Remedies," which was similar to a magazine published by plaintiff under the name "The Little Cherokee Visitor," and the simulation of plaintiff's products by defendants as to color, size and size of container, and descriptive matter on the labels.

While the bill contained some other claims that were merely conclusions and therefore not admitted by the demurrer, it alleged and many other material facts therefore not both were affirmatively and properly pleaded and they demonstrate abundantly and conclusively that the organization of the "Cherokee Medicine Company" by the individual defendants, and its and their entire purpose and course of dealing were calculated to and did of necessity deceive the public into dealing with the "Cherokee Medicine Company" and the belief that it was the "Cherokee Remedy Company," which had been long established and enjoyed a favorable reputation because of the character and quality of its products.

It is urged as a special cause of demurrer that "Cherokee" is the designation of a nationally known Indian tribe or Indian district and that under the law plaintiff could not have the exclusive use of such name when applied to well known articles of commerce, such as remedies. It is sufficient answer to this contention to state that whatever persons engaging in business, individually or otherwise, take advantage of the similarity of the name adopted by them to the one under which another had been carrying on his business to mislead the public into the belief that the two establishments were one and the same, they violate the lawful rights of the latter and the plaintiff principles of

equity. Fraud is the gist of actions of this kind. Courts of equity will never enjoin the use of generic or descriptive words in a trade mark or business name except upon an allegation and proof of actual fraud or fraud resulting from a similarity of the names tending to lead those dealing with the parties to believe that they are one and the same. (Koebel v. Landlords' Protective Bureau, 202 Ill. 176.) In this class of cases involving the purely voluntary selection of a name, the selection of an arbitrary name, to which another has given a trade reputation or value in connection with the very class of goods defendant intends to put on the market under a name containing the arbitrary or trade name, would seem to be ordinarily of itself sufficient proof of unfair competition without further proof of fraudulent intent. (Eureka Fire Hose Co. v. Eureka Rubber Manufacturing Co., 69 N. J. Eq. 159.)

In embarking on their new business enterprise defendants had an entire world of names to select from and it is obvious to us that, if they had not been actuated by ulterior motives, they would not have selected for their business a name containing "Cherokee." If they felt that an Indian name carried any peculiar significance in the manufacture and advancement of the sale of their medicinal preparations there were hundreds of such available without appropriating a name which had been used by plaintiff for seventeen years. There was no occasion to adopt a name which would be likely to mislead the public and induce it to believe that the business which they established was conducted by plaintiff. It was easy to choose a satisfactory name, unlike plaintiff's, and to conduct the business in such a way as to leave plaintiff the whole benefit of such reputation as he had gained in the community through the use of his trade name, the Cherokee Remedy Company. (Samuels v.

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In considering on their new business enterprise defendants had an entire world of names to select from and it is obvious to us that, if they had not been actuated by ulterior motives, they would not have selected for their business a name containing "Cherokee." If they felt that an Indian name carried any peculiar significance in the manufacture and advertisement of the sale of their medicinal preparations there were hundreds of such available without appropriating a name which had been used by plaintiff for seventeen years. There was no occasion to adopt a name which would be likely to mislead the public and induce it to believe that the business which they established was conducted by plaintiff. It was easy to choose a meaningless name, unlike plaintiff's, and to conduct the business in such a way as to leave plaintiff the whole benefit of such reputation as he had gained in the community through the use of his trade name, the Cherokee Remedy Company. (Remedy v.

Spitzer, 177 Mass. 226, 58 N. E. 693.)

Every authority to which our attention has been directed or with which we are familiar holds directly contrary to defendants' contention that, because plaintiff was not incorporated, and because they had incorporated under the name Cherokee Medicine Company, the corporation was entitled to the exclusive use of the name Cherokee. A corporate charter grants no immunity in the use of a deceptive name, and the adoption by a company of the trade name of its goods as a part of its corporate name after knowledge of the use of such name by another has been held to give the company no added rights. The same rule applies to corporate names as applies to the names of natural persons. The name may be used but only if used honestly. The good faith of the incorporators is immaterial if the name too closely resembles that of any other previously established corporation, partnership, or individual engaged in the same line of business, and material confusion or injury results therefrom, and, of course, a name selected and adopted for the purpose of deception and calculated to produce it will be enjoined. (63 Corpus Juris, section 122, page 439.)

The facts in this cause preclude any other conclusion than that the name of defendant corporation and the name under which its products are sold were purposely selected and adopted to deceive the public and to defraud plaintiff. In the case of Bender v. Bender Store and Office Fixture Company et al., 178 Ill. App. 203, where the plaintiff had been doing business as an individual for a number of years under the name of Bender Store and Office Fixtures, and where defendants incorporated under the name Bender Store and Office Fixture Company, this court in affirming an injunction granted to restrain the use of the latter name as the corporate name, stated at page 207:

Spitzer, 177 Misc. 826, 28 N. E. 693.)

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"It is true, persons seeking to form a corporation may ordinarily choose any name their fancy dictates, subject, however, to the rule that they may not choose the name of a corporation already existing, or one that is to be used to deceive the public, or to be passed off for that of some other person or firm in business. * * * When a corporation violates that rule, it does so at its peril. Neither does the fact that the state issues a charter to a corporation by a certain name give to such corporation a right to use it, if it was deliberately chosen, or is used for the purpose of deceiving the public and thereby appropriating the business of another. * * * When such unfair name is selected by a corporation for the purpose of deceiving the public into the belief that its goods are the goods of another, the use of that name for that means will be enjoined. * * * We think the rule goes even further and is that when the use of a name results in the palming off of one's goods on the public as the goods of another, the use of such name will be enjoined."

In this case the well pleaded allegations of the bill being admitted by the demurrer, the fraudulent design alleged as well as the fraudulent means employed by the defendants for its accomplishment, stand admitted of record. The fraud being thus conceded we think it clear, in the light of the authorities above cited, that the plaintiff has shown itself entitled to relief. The plaintiff has a right to protection against a usurpation of its patronage, its business, its credit and reputation by false, fraudulent and improper means. Honest and open competition is not forbidden by law, and furnishes no ground for complaint. But a simulation of the name, character, system and methods of another, for the purpose of deceiving the public and leading persons dealing with the usurpers to suppose that they are dealing with the party whose rights are thus usurped, constitutes an offense against the rules of honesty and fair dealing which should invoke the aid of a court of equity. We think the demurrer should be overruled and the defendants required to answer the bill, and, if upon final hearing the allegations of fraud are sustained, the court should apply such remedy as will protect the plaintiff against a continuation of the fraud. (Merchants' Detective Ass'n v. Detective Mercantile Agency, 25 Ill. App., 250, 259.)

For the reasons indicated herein the order of the Circuit

"It is true, persons seeking to form a corporation may ordinarily choose any name their fancy dictates, subject, however, to the rule that they may not choose the name of a corporation already existing, or one that is so like it as to be apt to deceive the public, or to be passed off for that of some other person or firm in business. * * * When a corporation violates that rule, it does so at its peril. Neither does the fact that the state issues a charter to a corporation by a certain name give to such corporation a right to use it, if it is not distinctively chosen, or is used for the purpose of deceiving the public and improperly appropriating the business of another. * * * When such unfair name is adopted by a corporation, or the purpose of deceiving the public into the belief that its goods are the goods of another, the use of that name for that means will be enjoined. * * * We think the rule goes even further and is that when the use of a name results in the palming off of one's goods as the goods of another, the use of such name will be enjoined."

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For the reasons indicated herein the order of the circuit

court sustaining defendants' general and special demurrer to plaintiff's second amended bill as amended and dismissing same should be and it is reversed, and the cause is remanded to the trial court with directions to overrule defendants' demurrer and for such other proceedings as are not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Scanlan, JJ., concur.

court sustaining defendants' general and special demurrer to plaintiff's second amended bill as amended and dismissing same should be and it is reversed, and the cause is remanded to the trial court with directions to overrule defendants' demurrer and for such other proceedings as are not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Soukup, JJ., concur.

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37024

MAURICE LASKEY,
Appellant,

v.

WILLIAM J. GORMANN,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

275 I.A. 635

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

February 20, 1933, a judgment by confession for $400 representing rent for the months of January and February, 1933, at $175 a month and $50 attorney's fees, was entered in favor of plaintiff, Maurice Laskey, against defendant, William J. Gormann, on a warrant of attorney contained in a written lease. March 15, 1933, defendant's motion to vacate the judgment and for leave to defend was allowed, the judgment to stand as security, and his petition to vacate was ordered to stand as his affidavit of merits. June 26, 1933, upon the trial of the cause by the court without a jury, final judgment was entered vacating the judgment by confession and for costs against plaintiff. This appeal followed.

No appearance or brief has been filed in this court by defendant.

Defendant's petition to vacate the judgment by confession alleged that the lease upon which judgment was confessed was executed September 1, 1932, and leased the premises known as the second floor of the building at 50 E. Oak street, for a term of one year, commencing October 1, 1932, for purported club

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MAURICE LAZARZ,
Appellant,

v.

WILLIAM J. DONAHEE,
Appellee.

MR. JUSTICE JUSTICE GILBERT
DELIVERED THE OPINION OF THE COURT.

February 20, 1933, a judgment by confession for $600 representing rent for the months of January and February, 1933, at $175 a month and $50 attorney's fees, was entered in favor of plaintiff, Maurice Lazarz, against defendant, William J. Donahee, on a warrant of attorney contained in a written lease. March 18, 1933, defendant's motion to vacate the judgment and for leave to defend was filed. The judgment to stand as security, and his petition to vacate was ordered to stand as his affidavit of merits. June 20, 1933, upon the trial of the cause by the court without a jury, final judgment was entered vacating the judgment by confession and for costs against plaintiff. This appeal followed.

No appearance or brief has been filed in this court by defendant.

Defendant's petition to vacate the judgment by confession alleged that the lease upon which judgment was confessed was executed September 1, 1932, and leased the premises known as the second floor of the building at 30 N. Dearborn street, for a term of one year, commencing October 1, 1932, for purported club

room purposes; that, in fact, the premises were leased to him for the operation of a book for the purpose of receiving bets on horse races; that at the time the lease was signed he informed plaintiff as to the use to which the premises were to be put; that on or about September 1, 1932, alterations were begun to fit the rooms for gambling, including the operation of a book on horse races; that racks were placed upon the walls to hold sheets used in connection with horse race betting and tables were installed suitable for gambling purposes; that plaintiff was aware of the nature of the alterations and equipment, and frequently visited the rooms during the period of the alterations; that, since September 15, 1932, said place was used exclusively for illegal gambling purposes; that plaintiff visited the rooms while bets were being made and actually saw the place in operation as a gambling house; that the rooms were used for no other purpose than as an illegal gambling establishment; and that at all times plaintiff had full and complete knowledge of the commission of such illegal acts upon the premises and of the unlawful use to which they were being put.

Plaintiff contends that the finding and judgment of the trial court were against the manifest weight of the evidence and that the court erred in not confirming the judgment by confession in his favor for rent under the lease for the months of January and February, 1933, because the evidence showed that he did not knowingly rent the premises for gambling purposes and did not, after he ascertained they were being so used, permit their continued use for such purposes.

It appeared from the rider attached to the lease that plaintiff was required to do certain carpenter, plumbing and steam fitting work to prepare the building for occupancy, and

room purposes; that, in fact, two premises were leased to him for the operation of a bank for the purpose of receiving bets on horse races; that at one time the leases were signed by the defendant plaintiff as to the use to which the premises were to be put; that on or about September 1, 1934, alterations were begun to fit the rooms for gambling, including the operation of a book on horse races; that tools were placed upon the walls to hold electric sockets in connection with horse race betting and tables were installed suitable for gambling purposes; that plaintiff was aware of the nature of the alterations and equipment, and frequently visited the rooms during the period of the alterations; that, since September 18, 1932, said place was used exclusively for illegal gambling purposes; that plaintiff visited the rooms while bets were being made and actually was the place in operation as a gambling house; that the rooms were used for no other purpose than as an illegal gambling establishment; and that at all times plaintiff had full and complete knowledge of the complexion of such illegal acts upon the premises and of the unlawful use to which they were being put.

Plaintiff contends that the finding and judgment of the trial court were against the manifest weight of the evidence and that the court erred in not continuing the judgment by default in his favor for want under the leases for the months of January and February, 1935, because the evidence showed that he did not knowingly rent the premises for gambling purposes and that, after he ascertained they were being so used, he at first threatened suit for such purposes.

It appeared from the injury attributed to the lease that plaintiff was required to do certain carpentry, plumbing and steam fitting work to prepare the building for occupancy, and

that defendant was to provide the lighting fixtures and to do his own painting and decorating.

There is a sharp conflict between the evidence offered by plaintiff and that offered by defendant. Defendant testified in his own behalf that he advised plaintiff at the time the lease was signed that he proposed to operate a gambling house in the premises; that plaintiff was present during the period when the rooms were being altered and prepared for occupancy and offered suggestions as to the location of the gambling fixtures to best serve the purposes for which they were intended; that plaintiff was solicitous that defendant have a high class clientele and not tolerate "bums" hanging around the place; that plaintiff was in his place several times when it was operating full swing, "a loud speaker, tallying races, flashes on the wall and people making bets in the room;" that at the time defendant signed the lease he was told by plaintiff to transact such business as he thereafter had concerning the lease with plaintiff's brother, David Laskey; that the reason that he did not pay the rent for January and February, 1933, was that David Laskey, who was a frequent visitor at the place, tried to raise the rent from $175 to $600, and said "you are doing an excellent business and can afford to pay more rent;" and that he was dispossessed through forcible detainer proceedings in March, 1933.

Sam Green testified in defendant's behalf that he was employed in Gormann's gambling house at 50 E. Oak street; that entrance to the rooms was had through two steel doors with peek holes in them which were kept locked except when patrons were admitted; and corroborated defendant as to the character of the place and the presence of plaintiff in it on numerous occasions.

Plaintiff and his brother, who was present when the

that defendant was to provide the lighting fixtures and to do his own painting and decorating.

There is a sharp conflict between the evidence offered by plaintiff and that offered by defendant. Defendant testified in his own behalf that he advised plaintiff at the time the lease was signed that he proposed to operate a gambling house in the premises; that plaintiff was present during the period when the rooms were being altered and prepared for occupancy and offered suggestions as to the location of the gambling fixtures to best serve the purposes for which they were intended; that plaintiff was solicitous that defendant have a high class clientele and not tolerate "bums" hanging around the place; that plaintiff was in his place several times when it was operating full swing, "a loud speaker, tallying racks, flashes on the wall and people making bets in the room;" that at the time defendant signed the lease he was told by plaintiff to transport work benches as he thought he had concluded the lease with plaintiff's brother, David Dexter; that the reason that he did not pay the rent for January and February, 1933, was that David Dexter, who was a frequent visitor at the place, tried to raise the rent from $[illegible] to $[illegible], and said "you are doing an excellent business and can afford to pay more rent;" and that he was dispossessed through terrible landlord proceedings in March, 1933.

Sam Green testified in defendant's behalf that he was employed in Dorman's gambling house at 80 [illegible]. Oak street; that entrance to the rooms was not through the street door with peek holes in them which were kept locked except when patrons were admitted; and corroborated defendant as to the character of the place and the presence of plaintiff in it on numerous occasions.

Plaintiff and his brother, who was present when the

lease was signed, denied defendant informed them that he contemplated using the premises for a gambling establishment and that they had any knowledge it was to be so used. They both testified defendant told them he intended to use the place as a club for commercial business men of the district.

Plaintiff testified that, except for one visit to the building with a carpenter in the latter part of September before defendant occupied same, he never entered the premises after the lease was signed and while defendant was in possession; that he never talked to defendant about increasing the rent; and that he received his first knowledge the premises were being used for gambling purposes about the middle of December, 1933, and that after he had started a forcible detainer action against defendant he mailed the following letter to him:

"December 27th, 1932.

Mr. William J. Germann,
50 E. Oak Street,
Chicago, Illinois.

Dear Sir:

This letter will serve as a notice that the lease dated September 1st, 1932, between Maurice Laskey and Wm. J. Germann on the premises described in said lease, known as the second floor of the building located at 50 East Oak Street, Chicago, Illinois, is hereby cancelled.

In accordance with the terms of the above mentioned lease, you are to vacate the above premises within thirty days from date of receipt of this notice.

Yours very truly,
Maurice Laskey."

David Laskey, plaintiff's brother, denied that he knew there was gambling going on in the place until about the middle of December, and that he was ever in the place during defendant's occupancy until some time in December when he went there with a bailiff to serve defendant in the forcible detainer action, at which time he discovered the steel doors. In all other respects his testimony was in substantial corroboration of plaintiff's.

When premises are rented by a lessee for gambling

lease was signed, denied defendant informed them that he contemplated using the premises for a gambling establishment and that they had any knowledge it was to be so used. They both testified defendant told them he intended to use the place as a club for commercial business men of the district.

Plaintiff testified that, except for one visit to the building with a carpenter in the latter part of November before defendant occupied same, he never entered the premises after the lease was signed and while defendant was in possession; that he never talked to defendant about interfering the rent; and that he received his first knowledge the premises were being used for gambling purposes about the middle of December, 1922, and that after he had started a forcible detainer action against defendant he mailed the following letter to him:

"Ivanhoe Club, Inc.

Mr. William J. Corcoran,
50 E. Oak Street,
Chicago, Illinois.

Dear Sir:

This letter will serve as a notice that the lease dated December 1st, 1922, between Murphy-Conley and Mr. J. Corcoran on the premises described in a lease, known as the second floor of the building located at [illegible] Chicago, Illinois, is hereby cancelled.

In accordance with the terms of the above mentioned lease, you are to vacate the above premises within thirty days from date of receipt of this notice.

Yours very truly,

Ivanhoe Club.

David Lindsay, of counsel [illegible] testified that in June there was gambling going on in the place until about the middle of December, and that he was over in the place during December; occupancy until some time in [illegible] when he went there with a bailiff to serve defendant in the forcible detainer action, at which time he discovered the usual scene. In all other respects his testimony was in substantial corroboration of plaintiff's.

When premises are rented by a lease for gambling

purposes and this is known to the lessor, or when the lessor accepts rent knowing of such use, there can be no recovery for rent. (In re Estate of Jackson, 269 Ill. App. 34; Harris v. McDonald, 194 Ill. 75; Fields v. Brown, 188 Ill. 111.) The evidence in this case abundantly and conclusively demonstrates that the premises were used for gambling purposes during the entire period of their occupancy by defendant. While the record indicates that defendant and the witness produced by him were impeached as to some aspects of their testimony, it does not necessarily follow that their evidence in its entirety is unworthy of belief.

In plaintiff's letter of December 27, 1933, to defendant, he specifies no reason for the cancellation of the lease, and we are unable to conclude from the contents of the letter whether plaintiff was actuated to send same because the premises were being used for gambling purposes or for some other reason. In an opinion written by Justice Scanlan in the Jackson case, supra, this court, after a recital of the facts and circumstances appearing in that case, said at page 46:

> "It is, of course, the law that the intent with which the lease was made, or knowledge that the place was being conducted as a gambling house, may be shown by direct and circumstantial evidence. It would be contrary to human experience and common knowledge to hold that the events that we have recited could have happened without the consent and knowledge of the claimants."

This language is particularly applicable to the facts and circumstances in the instant case.

The trial judge saw and heard the witnesses, and in view of his much more advantageous opportunity of determining their credibility it would conform to no principle of law with which we are familiar to substitute our judgment for his on the conflicting evidence presented.

purposes and this is known to the lessor, or when the lessor accepts rent knowing of such use, there can be no recovery for rent. (In re Estate of Jackson, 84 Ill. App. 34; Hurtle v. McDonald, 104 Ill. 73; Kinsie v. Brown, 188 Ill. 111.) The evidence in this case abundantly and conclusively demonstrates that the premises were used for gambling purposes during the entire period of their occupancy by defendant. While the record indicates that defendant and the witness produced by him were impeached as to some aspects of their testimony, it does not necessarily follow that their evidence in its entirety is unworthy of belief.

In plaintiff's letter of December 27, 1933, to defendant, he specifies no reason for the cancellation of the lease, and we are unable to conclude from the contents of the letter whether plaintiff was motivated to send some document the premises were being used for gambling purposes or for some other reason. In an opinion written by Justice Scanlan in the Jackson case, supra, this court, after a recital of the facts and circumstances appearing in that case, said at page 40:

> "It is, of course, the law that the intent with which the lease was made, or knowledge that the place was being conducted as a gambling house, may be shown by direct and circumstantial evidence. It would be contrary to common experience and common knowledge to hold that the events that we have recited could have happened without the consent and knowledge of the claimants."

This language is particularly applicable to the facts and circumstances in the instant case.

The trial judge saw and heard the witnesses, and in view of his much more advantageous opportunity of determining their credibility it would conform to no principle of law with which we are familiar to substitute our judgment for his on the conflicting evidence presented.

In our opinion the finding and judgment of the trial court were not against the manifest weight of the evidence.

For the reasons indicated herein the judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

In our opinion the finding and judgment of the trial court were not against the manifest weight of the evidence.

For the reasons indicated herein the judgment of the municipal court is affirmed.

AFFIRMED.

Crighy and Gaeinan, JJ., concur.

554

37048

GEORGIA BROWN,
Appellee,

v.

FIRST UNION TRUST AND SAVINGS BANK, doing business as Midway Apartment Hotel,
Appellant.

) APPEAL FROM MUNICIPAL COURT OF CHICAGO.

275 I.A. 635

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment in favor of plaintiff, Georgia Brown, for $200, entered in the Municipal court on the verdict of a jury in an action brought for personal injuries alleged to have been received by her as a result of defendant's negligence.

Plaintiff's statement of claim alleged that March 21, 1932, while a resident at the Midway Apartment Hotel at 1535 East 60th street, operated and managed by defendant, she was walking down the steps of the vestibule, and while in the exercise of due care her foot slipped and she fell on the steps and the floor below the steps because of their slippery condition caused by snow and water having blown in through the open door leading from the vestibule to the street; that such slippery condition was due to the negligence and carelessness of defendant in its operation and management of the hotel in allowing the outer door to blow open and continue to remain open, and in allowing said door to become frozen to the floor and ice about the floor in such a manner that snow accumulated in the vestibule and was melted by the heat from radiators located therein; and that as a result of

37042

GEORGIA BROWN,
Appellee,

v.

NIGHT UNION TRUST AND
SAVINGS BANK, doing business
as Midway Apartment Hotel,
Appellant.

) APPEAL FROM MUNICIPAL
) COURT OF CHICAGO.

275 I.A. 635

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment in favor of plaintiff, Georgia Brown, for $200, entered in the Municipal court on the verdict of a jury in an action brought for personal injuries alleged to have been received by her as a result of defendant's negligence.

Plaintiff's statement of claim alleged that March 21, 1932, while a resident at the Midway Apartment Hotel at 1552 East 60th street, operated and managed by defendant, she was walking down the steps of the vestibule, and while in the exercise of due care her foot slipped and she fell on the steps and the floor below the steps because of their slippery condition caused by snow and water having blown in through the open door leading from the vestibule to the street; that such slippery condition was due to the negligence and carelessness of defendant in its operation and management of the hotel in allowing the outer door to blow open and continue to remain open, and in allowing said door to become frozen to the floor and ice about the floor in such a manner that snow accumulated in the vestibule and was melted by the heat from radiators located therein; and that as a result of

such carelessness she sprained and bruised her ankle, causing her much pain and suffering and confining her to her room unable to walk for several days.

Defendant contends that it was not negligent in its operation and management of the hotel and that the court erred in overruling its motion for a directed verdict, both at the close of plaintiff's case and at the close of all the evidence, for the reason that plaintiff was guilty of contributory negligence as a matter of law and that no negligence on defendant's part was disclosed by the evidence.

It appeared that the vestibule leading from the lobby of the hotel to the street door was twelve or thirteen feet long and about eight feet wide; that just outside the lobby door there was a platform or landing about four feet long and the width of the vestibule, and that there was a similar platform or landing at the foot of the steps; that there were six or seven steps leading from the upper platform to the lower landing with a brass handrail on either side of them, and that the steps were covered their full width with white rubber and that perforated black rubber mats one and one half inches thick were laid over that covering the center five and one half feet of the steps.

Plaintiff testified in her own behalf that she paid rent by the week for an apartment in the hotel where she had lived for eight years; that March 21, 1932, she had been in and out of the building three times and that a blizzard was blowing all day; that about 7:30 o'clock that evening, when she and her husband alighted from the elevator at the lobby floor prepared to leave the building, she saw that the floor was wet, and that when they reached the inner vestibule door she saw that the vestibule steps were wet before she started to descend them; that when she

such overclassmen she sprained and bruised her ankle, causing her much pain and suffering and confining her to her room unable to walk for several days.

Defendant contends that it was not negligent in its operation and management of the hotel and that the court erred in overruling its motion for a directed verdict, both at the close of plaintiff's case and at the close of all the evidence, for the reason that plaintiff was guilty of contributory negligence as a matter of law and that no negligence on defendant's part was disclosed by the evidence.

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Plaintiff testified in her own behalf that she paid rent by the week for an apartment in the hotel where she had lived for eight years; that March 21, 1932, she had been in and out of the building three times and that a blizzard was blowing all day; that about 7:30 o'clock that evening, when she and her husband alighted from the elevator at the lobby floor prepared to leave the building, she saw that the floor was wet, and that when they reached the inner vestibule door she saw that the vestibule steps were wet before she started to descend them; that when she

and her husband had reached the fourth step down she started to take hold of the handrail so that she would not slip and that just then she did slip and fell; that the corridor and steps were very wet from the snow that had come in and been melted by the radiators in the vestibule; that the wind had blown the snow in and there was no dry space on the floor or steps of the vestibule; and that the outer door was frozen open and obstructed with ice so that it could not shut.

It was stipulated that plaintiff's husband, C. K. Brown, would testify substantially as she did. He also testified that the steps were sopping wet with snow and stuff that had blown in through the open door, and that the outer door was open practically all day - frozen open.

Mrs. Charles Murphy, an employee of defendant, testified in defendant's behalf that fifty or one hundred people went in and out of the building that evening using the vestibule steps and doors; that there was no ice or snow in the vestibule, but that some snow might have drifted in a foot or two through the outer door as it opened and closed on to the lower landing and melted from the heat of the radiators; that there was no ice or snow on the steps, the lower one of which was four feet away from the door; that she noticed the condition of the vestibule a hundred times that day; and that the floor and steps were wiped up every half hour.

The manager of the hotel, Lawrence Hugent, testified that he was around the hotel all day and that an unusual blizzard was blowing; that the vestibule steps were mopped up every half or three quarters of an hour; that as he left the building about six o'clock that evening one of the porters was wiping the steps; that the outer door swung open to the right as one went out, and that the left side

and her husband had reached the fourth step down she started to take hold of the handrail so that she would not slip and that just then she did slip and felt that the corridor and steps were very wet from the snow that had come in and been melted by the radiators in the vestibule; that the wind had blown the snow in and there was no dry space on the floor or steps of the vestibule; and that the outer door was frozen open and obstructed with ice so that it could not close.

It was stipulated that plaintiff's husband, O. K. Brown, would testify substantially as she did. He also testified that the steps were coupling not with snow and sleet that had blown in through the open door, and that the outer door was open practically all day - frozen open.

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of the steps and lower landing got wet, but the right half remained dry; and that he did not notice whether the outer door was stuck with any ice or not, but "it seems logical that some would clog in there that would prevent the door from closing may be an inch."

As we read this record plaintiff, according to her own testimony, knew that a blizzard was raging and had raged all day blowing snow into the vestibule, which, as it melted, caused the steps to become wet and slippery. She had used the stairs under the same conditions six times that day prior to her accident. She testified that when she and her husband alighted from the elevator at the lobby the floor was wet, and that when she reached the inner door of the vestibule she saw the steps were wet before she started to d escend them. Although there was a brass handrail on both sides of the steps, she did not make use of either rail prior to the time she slipped and fell.

Plaintiff was as well aware of the condition existing on the steps and platforms of the vestibule as defendant and should be held to as high a degree of care for her own safety as would be required of defendant. A party has no right to knowingly expose herself to danger and then recover damages for an injury which she might have avoided by the use of reasonable precaution. Although it is true that the question of contributory negligence is ordinarily a question of fact for the jury, yet when there is no conflict in the evidence and on her own testimony the court can clearly see that the injury was the result of negligence of the party injured, it should not hesitate to instruct the jury to return a verdict for defendant. (Wilson v. I. C. R. R. Co., 210 Ill. 603; Beidler v. Branshaw, 200 id. 425.) In the instant case there is no conflict in the testimony as to plaintiff's con-

of the steps and lower landing got wet, but the right half remained dry; and that he did not notice whether the outer door was stuck with ice or not, but "it seems logical that some would clog in there that would prevent the door from closing may be an inch."

As we read this record plaintiff, according to her own testimony, knew that a blizzard was raging and had raged all day blowing snow into the vestibule, which, as it melted, caused the steps to become wet and slippery. She had used the stairs under the same conditions six times that day prior to her accident. She testified that when she and her husband alighted from the elevator at the lobby the floor was wet, and that when she reached the inner door of the vestibule she saw the steps were wet before she started to descend them. Although there was a brass handrail on both sides of the steps, she did not make use of either rail prior to the time she slipped and fell.

Plaintiff was on full notice of the condition existing on the steps and platform of the vestibule as defendant and should be held to as high a degree of care for her own safety as would be required of defendant. A party has no right to knowingly expose herself to danger and then recover damages for an injury which she might have avoided by the use of reasonable precaution. Although it is true that the question of contributory negligence is ordinarily a question of fact for the jury, yet when there is no conflict in the evidence and on her own testimony the court can clearly see that the injury was the result of negligence of the party injured, it should not hesitate to instruct the jury to return a verdict for defendant. (Hilton v. L. G. E. R. Co., 210 Ill. 603; Heisler v. Brandner, 210 Ill. 422.) In the instant case there is no conflict in the testimony as to plaintiff's con-

duct at and immediately prior to the time she slipped and fell. The record does not disclose any evidence of plaintiff's conduct which might prove or tend to prove any exercise of ordinary care for her own safety.

At the close of plaintiff's testimony and at the close of all the testimony, defendant asked the court to instruct the jury to find defendant not guilty. When the evidence is all considered, together with all the reasonable inferences to be drawn therefrom, in its aspect most favorable to plaintiff, we are constrained to say that she failed to prove one of the three essential elements of her case, - i.e., that she was in the exercise of ordinary care for her own safety. The trial court should have instructed the jury to find the defendant not guilty. (Illinois Central R. R. Co. v. Oswald, 338 Ill. 270.)

The judgment of the Municipal court is therefore reversed as a matter of law.

REVERSED.

Gridley and Scanlan, JJ., concur.

duct at and immediately prior to the time she slipped and fell. The record does not disclose any evidence of plaintiff's conduct which might prove or tend to prove any exercise of ordinary care for her own safety.

At the close of plaintiff's testimony and at the close of all the testimony, defendant asked the court to instruct the jury to find defendant not guilty. When the evidence is all considered, together with all the reasonable inferences to be drawn therefrom, in its aspect most favorable to plaintiff, we are constrained to say that she failed to prove one of the three essential elements of her case, - i.e., that she was in the exercise of ordinary care for her own safety. The trial court should have instructed the jury to find the defendant not guilty. (Illinois Central R. R. Co. v. Gossard, 198 Ill. 270.)

The judgment of the Municipal court is therefore reversed as a matter of law.

REVERSED.

Gridley and Scanlan, JJ., concur.

37140

2544 NORTH AVENUE FOOD MART, Inc., for use of CLAUDE NEON FEDERAL COMPANY, a Corporation,
Appellee,

vs.

LEON DICKMAN and FRANK SAMPSON,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

275 I.A. 636

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Claude Neon Federal Company, beneficial plaintiff, obtained a judgment for $681 against the 2544 North Avenue Food Mart, Inc., (hereinafter referred to as the Food Mart) predicated upon a contract for electric service and advertising. An execution issued as to the Food Mart and was returned by the bailiff no property found. An affidavit for garnishee summonses was filed April 26, 1933, and on the same day garnishee summonses issued against several defendants upon whom no service was had, but service was had upon the garnishees, Leon Dickman and Frank Sampson. In answer to interrogatories propounded to them the garnishees answered that they were not indebted to the judgment debtor and had no property, goods, chattels, rights, credits or effects of any kind belonging to it in their possession. In answer to interrogatory No. 6 Dickman stated that he subscribed for twelve shares, amounting to $1200, of the capital stock of the nominal plaintiff and that same was paid for. Sampson, in answer to the same interrogatory, stated that he subscribed for eleven shares of the capital stock of the Food Mart, amounting to $1100, which was paid for. Upon the trial of the garnishment action by the court without a jury, judgment was entered against garnishees for $681 on July 19, 1933. They prayed an appeal to this court, which was granted, and they were allowed sixty days in which to file a bill of exceptions.

Heretofore the beneficial plaintiff (appellee) moved this

37140

2544 NORTH AVENUE FOOD MART, Inc.,
for use of CLAUDE ROON FEDERAL
COMPANY, a Corporation,
Appellee,

vs.

LEON DIGMAN and URBAN BARTOSH,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2175 I.A. 636

MR. JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

Claude Roon Federal Company, hereinafter plaintiff, obtained a judgment for $[illegible] against the 2544 North Avenue Food Mart, Inc., (hereinafter referred to as the Food Mart) evidenced upon a contract for electric service and advertising. An execution issued on the Food Mart and was returned by the bailiff no property found. An alias for garnishee summons was filed April 26, 1950, and on the same day garnishee summons issued against several defendants upon whom no service was had, but service was had upon the garnishees, Leon Digman and Frank Bartosh. In answer to interrogatories propounded to them the garnishees answered that they were not indebted to the judgment debtor and had no property, goods, chattels, rights, credits or effects in any kind belonging to it in their possession. In answer to interrogatory No. 6 Digman stated that he subscribed for twelve months, according to Exh. of the capital stock of the Medical Clinic, and that was paid for. Bartosh, in answer to the same interrogatory, stated that he subscribed for eleven shares of the capital stock of the Food Mart, amounting to $[illegible], which was paid for. Upon the trial of the garnishment action in the court without a jury, judgment was entered against garnishees for $[illegible] on July 19, 1950. They prayed an appeal to this court, which was granted. Ad. Exh. were filed also, in which to file a bill of exceptions.

Heretofore the unpaid plaintiff (appellee) served this

court to strike the stenographic report designated as the bill of exceptions from the record; to strike the abstract from the files; and to dismiss the appeal of garnishees. All three motions, which were reserved to hearing, are predicated upon the ground that the bill of exceptions was not signed, sealed nor filed within the sixty days allowed by the order of the Municipal court in granting the appeal.

While the motions to strike the bill of exceptions and abstract and to dismiss the appeal are not without merit and might have been allowed under precedents established by our Supreme court, (People v. Rosenwald, 266 Ill. 548; Lassers v. North German American Lloyd Steamship Company, 244 Ill. 570) we have concluded to consider the bill and abstract. The motions to strike and dismiss the appeal are therefore denied.

An indebtedness from the garnishees to the judgment debtor is, of course, essential to the maintenance of this action.

The garnishees contend that, when a stock subscription is paid by any one, the obligation of the subscriber is fulfilled, and that they as subscribers cannot be charged with liability on their subscriptions for capital stock of the Food Mart, either by that corporation or its judgment creditors, inasmuch as the stock subscribed for by them was paid for in the manner hereafter indicated.

It will have to be conceded that, if the Food Mart received bona fide payment of the stock subscribed for by garnishees from any one, the garnishees are absolved from liability by reason of such subscriptions.

While we have carefully read the entire bill of exceptions in this case and examined all the evidence, we deem it necessary to discuss only certain phases of it.

It appeared that Frank Sampson and Leon Sex were in the real estate business and were also promoters of the Food Mart, and

court to strike the stenographic report designated as the bill of exceptions from the record; to strike the abstract from the files; and to dismiss the appeal of plaintiffs. All three motions, which were reserved to hearing, are predicated upon the ground that the bill of exceptions was not signed, sealed nor filed within the sixty days allowed by the order of the municipal court in granting the appeal.

While the motions to strike the bill of exceptions and abstract and to dismiss the appeal are not frivolous merits and might have been allowed under precedents established by our supreme court, (Jacobs v. Hornsfield, 366 Ill. 346; Lawrence v. North German American Lloyd Steamship Company, 244 Ill. 371) we have concluded to consider the bill and abstract. The motions to strike and dismiss the appeal are therefore denied.

An indebtedness from the partnership to the business debtor is, of course, essential to the maintenance of this action.

The plaintiffs contend that, when a stock subscription is paid by any one, the obligation of the subscriber is fulfilled, and that they as subscribers cannot be charged with liability on their subscriptions for capital stock of the book store, either by that corporation or its judgment or liquidator, inasmuch as the stock subscribed for by them was paid for in the manner here indicated.

It will have to be conceded that, in the book last involved some like payment of the stock subscribed for by plaintiffs was from any one, the creditors are entitled from liability by reason of such subscriptions.

While we have carefully read the entire bill of exceptions in this case and examined all the evidence, we deem it necessary to discuss only certain phases of it.

It appeared that Frank Simpson and Frank Cox were in the real estate business and were also promoters of the book shop, and

that in the conduct of their business they made use of the following corporate entities: Sampson & Sex, Inc., Sampson, Sex Bond and Mortgage Company (hereinafter referred to as the Bond and Mortgage Company) and 2544 North Avenue Food Mart, Inc.; that the garnishees signed the stock subscriptions in question; that they were dummies in the transaction for Leon Sex; that, according to their testimony, the stock was paid for by Leon Sex handing each of them the amount of cash due on his stock subscription and the immediate return of the cash by each of them to Sex, the simultaneous delivery of the certificates of stock by Sex to them, and the endorsement of the certificates in blank by them, and their immediate redelivery to Sex; that the Food Mart never had a bank account and the money for these subscriptions never, in fact, reached that company; that no record of the accounts and affairs of the Food Mart was kept except in the books of the Sampson, Sex Bond & Mortgage Company; that the individuals Frank Sampson and Sex and the corporations were one and the same, for the purposes of Sampson and Sex; that the Bond and Mortgage Company had charged itself on its books with $5000 worth of stock, (the full capitalization of the Food Mart) and that the payment for that stock by it, as shown by its books, consisted principally of the payment of attorney's fees, and salary and expenses to Frank Sampson.

If the fanciful tale of the garnishees as to the manner in which they paid for their stock is deserving of credence at all, which we doubt, still it must be held that the transaction related by them in that regard did not constitute payment of the stock. It is admitted that no money of theirs went to pay for the stock and there is no honest, credible evidence in the record that anyone paid for it.

The evidence in this case discloses that Sampson and Sex were the real owners of all three corporations, and further disclose

that in the conduct of their business they made use of the following corporate entities: Sampson & Sax, Inc., Sampson, Sax Land and Mortgage Company (hereinafter referred to as the Land and Mortgage Company) and 2444 North Avenue Food Mart, Inc.; that the petitioners signed the stock subscriptions in question; that they were dummies in the transaction for hire; that, according to their testimony, the stock was paid for by them and handing each of them the amount of cash due on his stock subscription and the immediate return of the cash by each of them to Sax, the simultaneous delivery of the certificates of stock by Sax to them, and the endorsement of the certificates in blank by them, and their immediate redelivery to Sax; that the Food Mart never had a bank account and the money for these subscriptions never, in fact, reached that company; that no receipt of the subscriptions and affiliation of the Food Mart was kept in the books of the Sampson, Sax Land & Mortgage Company; that the individuals Frank Sampson and Sax and the corporations were one and the same, for the purposes of Sampson and Sax; that the Land and Mortgage Company had managed itself on its books with 2000 units of stock, (the full capitalization of the Food Mart) and that the payment for that stock by it, as shown by its books, consisted principally of the expense of attorney's fees, and salary and expenses to Frank Sampson.

If the logical role of the petitioners - i.e. the manner in which they paid for the stock in exercising of dominion of all, which we doubt, still it must be said that the transaction related by them in that regard did not constitute payment of the stock. It is admitted that no money or assets went to any for the stock and there is no doubt, credible evidence to the effect that anyone paid for it.

The evidence in this case discloses that Sampson and Sax were the real owners of all three corporations, and further disclosed

a shuffling of corporate entities, including the Food Mart, and a juggling with records and figures with the evident purpose and intention of defrauding creditors of the Food Mart. Inasmuch as Dickman knowingly permitted himself to be used to carry out the fraudulent designs of the promoters, he will have to suffer the consequences of liability in this action along with Sampson.

After an earnest consideration of all the evidence we are compelled to the conclusion that the garnishees were parties to a fraudulent and fictitious release of the indebtedness for their stock subscriptions; that they are still indebted to the Food Mart for same; and that substantial justice has been done between the parties by the judgment in this cause.

For the reasons indicated herein the judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

a shutting of corporate entities, including the food mart, and a juggling with records and figures with the evident purpose and intention of defrauding creditors of the food mart. Inasmuch as Dickman knowingly permitted himself to be used to carry out the fraudulent designs of the promoters, he will have to suffer the consequences of liability in this action along with them.

After an earnest consideration of all the evidence we are compelled to the conclusion that the purchases were parties to a fraudulent and fictitious release of the indebtedness for their stock subscriptions; that they are still indebted to the food mart for same; and that substantial justice has been done between the parties by the judgment in this cause.

For the reasons indicated herein the judgment of the municipal court is affirmed.

AFFIRMED.

Crichley and Bonnlam, JJ., concur.

57 17

37232

SAMUEL DONIAN,
Appellant,

v.

LOUIS PAPPAS,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

275 I.A. 636

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

June 8, 1933, judgment by confession for $606.79 was entered against defendant on sixteen chattel mortgage notes. June 16, 1930, defendant filed a motion to vacate and for leave to defend, which motion was allowed and his petition to vacate was ordered to stand as an affidavit of merits. Upon the trial by the court without a jury finding and judgment were entered in favor of defendant October 5, 1933. This appeal seeks to reverse that judgment.

Defendant's petition to vacate the judgment by confession alleged that he had been engaged in the confectionery business at 1220 Sedgwick street, Chicago, Illinois, and being indebted to plaintiff for ice cream sold and delivered to him, executed and delivered to plaintiff sixteen chattel mortgage notes for an aggregate of $396.90, and a chattel mortgage covering all of the fixtures and chattels belonging to him then located at 1220 Sedgwick street to secure the notes; that such fixtures and property were reasonably worth $1,000, having actually cost $3,000 about eighteen months prior thereto; that his business declined and he was unable to pay the notes as they matured; that about May 1, 1927, plaintiff, or his agents or attorneys, took possession of the fixtures and chattels covered by the mortgage and compelled defendant to leave

STATE

SAMUEL DONLAN,
Appellant,

v.

LOUIS RAPPAS,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

275 I.A. 636

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

June 8, 1932, judgment by confession for $866.79 was entered against defendant on sixteen chattel mortgage notes. June 16, 1932, defendant filed a motion to vacate and for leave to defend, which motion was allowed and his petition to vacate was ordered to stand as an affidavit of merits. Upon the trial by the court without a jury finding and judgment was entered in favor of defendant October 6, 1932. This appeal seeks to vacate that judgment.

Defendant's petition to vacate the judgment by confession alleged that he had been engaged in the confectionery business at 1220 Sedgwick street, Chicago, Illinois, and having had need to plaintiff for ice cream and [illegible] in 1931, executed and delivered to plaintiff sixteen chattel mortgage notes for an aggregate of $866.80, and a chattel mortgage covering all of the fixtures and chattels belonging to him then located at 1220 Sedgwick street to secure the notes; that such fixtures and property were reasonably worth $1,000, having actually cost $3,000 about eighteen months prior thereto; that his business declined and he was unable to pay the notes as they matured; that about May 1, 1932, plaintiff, or his agents or attorneys, took possession of the fixtures and chattels covered by the mortgage and compelled defendant to leave

the store and turn the keys over to them; that plaintiff converted the fixtures to his own use; that after he had taken possession of such fixtures, plaintiff admitted and advised defendant that he had sold the fixtures and "gotten his money out of them;" that no demand was ever made by plaintiff or anyone in his behalf for the payment of the notes after plaintiff had taken possession of the fixtures; that by taking possession of the fixtures and stock of defendant, plaintiff satisfied in full any claim he had against defendant under and by virtue of the notes and chattel mortgage securing them; that no notice of either the foreclosure or sale was served upon him; and that no report of the foreclosure or the sale was ever made or given to him.

Defendant testified that he purchased the fixtures and going business for $2,000; that in his opinion the fixtures were worth that amount; that he executed the notes sued upon; that he was delinquent in his payments on the notes when plaintiff took possession of the premises and fixtures April 1, 1927; that in his presence plaintiff's agent posted a notice of the foreclosure and sale on the door of the store; that he gave plaintiff's agent the key of the store and walked out; that he never received a report of the chattel mortgage sale; and that some time later plaintiff told him that he had sold the fixtures and thus satisfied the amount due on the notes.

Plaintiff testified that he had never talked with defendant after the sale and had not told him that the notes were fully paid; that the notes were not, in fact, fully paid; that he had never been at the store but saw the fixtures after their removal from the store, and that they were not reasonably worth over $150 or $200.

John M. Allen testified in plaintiff's behalf that he had been employed for over fifteen years by the Columbia Ice and Ice Cream Company of which plaintiff was president, and that

the store and turn the keys over to them; that plaintiff converted the fixtures to his own use; that after he had taken possession of such fixtures, plaintiff admitted and advised defendants that he had sold the fixtures and "gotten his money out of them"; that no demand was ever made by plaintiff or anyone in his behalf for the payment of the notes after plaintiff had taken possession of the fixtures; that by taking possession of the fixtures and stock of defendant, plaintiff satisfied in full any claim he had against defendant under and by virtue of the notes and chattel mortgage securing them; that no notice of either the foreclosure or sale was served upon him; and that no report of the foreclosure or the sale was ever made or given to him.

Defendant testified that he purchased the fixtures and going business for $2,000; that in his opinion the fixtures were worth that amount; that he executed the notes and gave; that he was delinquent in his payments on the notes when plaintiff took possession of the premises and fixtures April 1, 1927; that in his presence plaintiff's agent posted a notice of the foreclosure and sale on the door of the store; that he gave plaintiff's agent the key of the store and walked out; that he never received a report of the chattel mortgage sale; and that some time later plaintiff told him that he had sold the fixtures and credited the amount due on the notes.

Plaintiff testified that he had never talked with defendant after the sale and had not told him that the notes were fully paid; that the notes were not, in fact, fully paid; that he had never been at the store but saw the fixtures after their removal from the store; and that they were not reasonably worth over $150 or $200.

John H. Allen testified in plaintiff's behalf that he had been employed for over fifteen years by the Columbia Ice and Ice Cream Company of which plaintiff was president; and that

during that period he had bought and sold fixtures and equipment for confectionery stores and was familiar with the value of same; that he had foreclosed the chattel mortgage in question; that it contained the usual provision that in the event of failure to pay the notes secured by it, the mortgagee had the right to take possession of the property and sell the same upon giving three days notice of the time, place and terms of the sale, and out of the proceeds to first pay the costs and expenses of the sale and then apply the balance, if any, on the amount due and unpaid on the notes; that he went to defendant's store April 7, 1927, and advised defendant that he was there to foreclose the mortgage and exhibited the notice of foreclosure and sale to him; that he posted the notices as required by statute, one of them on the door in defendant's presence; that thereupon defendant gave him the keys and walked out, and a watchman was placed in charge of the mortgaged property; that he sold the property to the highest bidder April 11, 1927; that there were several bids, but it was sold to the witness for $175, the highest and best bid; that he prepared a report of the sale and mailed it to the last known address of defendant; that subsequently it was returned undelivered because of the inability of the post office department to locate defendant; that the report of the sale listed the cost and expense of the foreclosure and sale at $125; that the witness was unable to locate defendant for several years after the sale; and that the property, if it continued in use in the store was not reasonably worth more than $150 or $175, but that it had to be removed and much of it had to be junked.

The only questions presented for determination on this appeal is whether the notes have been paid and whether plaintiff had complied with the statutes of the State of Illinois in foreclosing the mortgage.

Defendant admitted the original indebtedness for which

during that period he had bought and sold fixtures and equipment for confectionery stores and was familiar with the value of money; that he had foreclosed the chattel mortgage in question; that it contained the usual provision that in the event of failure to pay the notes secured by it, the mortgagee had the right to take possession of the property and sell the same upon giving three days notice of the time, place and terms of the sale, and out of the proceeds to first pay the costs and expenses of the sale and then apply the balance, if any, on the amount due and unpaid on the notes; that he went to defendant's store April 3, 1929, and advised defendant that he was going to foreclose the mortgage and exhibited the notice of foreclosure and sale to him; that he posted the notices as required by statute, one of them on the door in defendant's premises; that thereupon defendant spoke to the boys and walked out, and a salesman was placed in charge of the mortgaged property; that he sold the property at the highest bidder April 11, 1929; that there were several bids, but it was sold to the witness for $175, the highest and best bid; that he then prepared a report of the sale and mailed it to the last known address of defendant; that subsequently it was returned undelivered because of the inability of the post office department to locate defendant; that the report of the sale listed the cost and expense of the foreclosure and sale at $[illegible]; that the witness was unable to locate defendant for several years after the sale and that the property, if it continues in use in the state was not reasonably worth more than $175, but that it had to be removed and moved at its risk to be taken.

The only question presented for determination on this appeal is whether the notes have been paid and whether plaintiff had complied with the statutes of the state of Illinois in foreclosing the mortgage.

Defendant admitted the original indebtedness for which

the notes and mortgage were given, as well as the execution of the notes and mortgage. He concedes his default in payment and the regularity and legality of the foreclosure. $606.79, the amount of the original judgment, represents the principal of the notes, interest and a reasonable attorney's fee.

Defendant urges (1) that the property covered by the mortgage was reasonably worth more than the $175 received for it at the sale; (2) that no report of the sale was ever made pursuant to the terms of the statute; and (3) that plaintiff had told him, subsequent to the sale, that sufficient money had been realized from the sale of the property to satisfy the amount due on the notes.

As to defendant's first contention, it is sufficient to state that in the absence of a showing of fraud or collusion, or that the sale was not fairly held, the amount bid at the sale is binding on both the mortgagor and the mortgagee, and the mere fact that the mortgagor may testify more than six years later that the value of the goods was greater than the amount brought at the sale cannot affect the legality of the sale or the sale price. Defendant admits that he had notice of the sale and he cannot be heard to complain about the amount the mortgaged property brought in the absence of fraud. Plaintiff had the right to foreclose the chattel mortgage and he cannot be held liablefor any alleged difference between the fair cash market value of the property and the amount realized upon the foreclosure sale. There is no claim that the sale was not properly advertised and conducted in accordance with the law. (Kuhnen-Siegrist Hardware Co. v. Papista, 267 Ill. App. 581.)

Equally without merit is defendant's second contention that his failure to receive a report of the sale vitiates the same. The record discloses that such report was mailed to his last known

the notes and mortgage were given, as well as the execution of the notes and mortgage. He concedes his default in payment and the regularity and legality of the foreclosure. 2606.75, the amount of the original judgment, represents the principal of the notes, interest and a reasonable attorney's fee.

Defendant urges (1) that the property covered by the mortgage was reasonably worth more than the $175 received for it at the sale; (2) that no report of the sale was ever made pursuant to the terms of the statute; and (3) that plaintiff had held him, subsequent to the sale, that sufficient money had been realized from the sale of the property to satisfy the amount due on the notes.

As to defendant's first contention, it is sufficient to state that in the absence of a showing of fraud or collusion, or that the sale was not fairly held, the amount bid at the sale is binding on both the mortgagor and the mortgagee, and the mere fact that the mortgagor may testify more than six years later that the value of the goods was greater than the amount brought at the sale cannot affect the legality of the sale or the sale price. Defendant admits that he had notice of the sale and he cannot be heard to complain about the amount the mortgaged property brought in the absence of fraud. Plaintiff has the right to foreclose the chattel mortgage and he cannot be held liable for any alleged difference between the fair cash market value of the property and the amount realized upon the foreclosure sale. There is no claim that the sale was not properly advertised and conducted in accordance with the law. (Lumber-Chemical Mfg. Co. v. Peplis, 267 Ill. App. 581.)

Equally without merit is defendant's second contention that his failure to receive a report of the sale vitiates the same. The record discloses that such report was mailed to his last known

address as provided by statute and the fact that it was returned undelivered to the sender by the United States Post Office department can only be charged to defendant by reason of the fact that he left no forwarding address. There was a substantial compliance with the statute in that plaintiff or his agent mailed the report to the only address of defendant known to either of them. In any event, under the terms of the statute, the failure to deliver or mail the report of a chattel mortgage sale to the mortgagor does not impair the legal effect of the sale, but merely renders the mortgagee liable to the mortgagor for one third of the value of the property so sold.

Defendant's third contention that plaintiff told him that the notes had been satisfied out of the proceeds of the sale is refuted by all of the credible evidence, facts and circumstances in the case. Plaintiff not only denied making such statement to defendant, but he testified that he had not even seen him since the sale, and the witness Allen testified that he had made a search over a period of several years after the sale without avail in an endeavor to locate defendant.

No contention is made by defendant that he paid the notes and the evidence abundantly shows that they were not satisfied from the proceeds of the sale. The evidence does show, however, that the property brought $175 at the sale and that the costs and expenses of the sale were but $125. Defendant was not allowed in the original judgment by confession the credit to which he was entitled of the $50 received for the property at the sale over and above the costs of same. In announcing his finding vacating the judgment by confession theretofore entered in this cause and deciding the issue in favor of the defendant, the trial judge advanced as his reason for his decision the novel proposition that, "here was a going business broken up by this foreclosure."

address as provided by statute and the fact that it was returned undelivered to the sender by the United States Post Office department can only be charged to defendant by reason of the fact that he left no forwarding address. There was a substantial compliance with the statute in that plaintiff or his agent mailed the report to the only address of defendant known to either of them. In any event, under the terms of the statute, the failure to deliver or mail the report of a chattel mortgage sale to the mortgagor does not impair the legal effect of the sale, but merely renders the mortgagee liable to the mortgagor for one third of the value of the property so sold.

Defendant's third contention that plaintiff told him that the notes had been satisfied out of the proceeds of the sale is refuted by all of the credible evidence, facts and circumstances in the case. Plaintiff not only denied making such statement to defendant, but he testified that he had not even seen him since the sale, and the witness Allen testified that he had made a search over a period of several years after the sale without avail in an endeavor to locate defendant.

No consideration is made by defendant that he paid the notes and the evidence abundantly shows that they were not satisfied from the proceeds of the sale. The evidence does show, however, that the property brought $175 at the sale and that the costs and expenses of the sale were but $125. Yet credit was not allowed in the original judgment by confession the credit to which he was entitled of the $50 received for the property at the sale over and above the costs of same. In summarizing his finding vacating the judgment by confession therein, and entered in this cause and deciding the issue in favor of the defendant, the trial judge advanced as his reason for his decision the novel proposition that, "here was a going business broken up by this foreclosure."

We are of the opinion that the judgment was clearly erroneous and that the trial judge was not justified for the reason stated by him or for any reason appearing in the record in entering judgment in defendant's favor. Defendant is entitled to a credit of $50 and interest on same amounting to $17.85, or a total credit of $67.85.

For the reasons indicated the judgment of the Municipal court is reversed and judgment will be entered herefor $538.84.

REVERSED AND JUDGMENT HERE.

Gridley and Scanlan, JJ., concur.

We are of the opinion that the judgment was clearly erroneous and that the trial judge was not justified for the reason stated by him or for any reason appearing in the record in entering judgment in defendant's favor. Defendant is entitled to a credit of $50 and interest on same amounting to $17.82, or a total credit of $67.82.

For the reasons indicated the judgment of the municipal court is reversed and judgment will be entered herein for $238.04.

IRVING CO. DUNNEBAY, JUDGE.

Crilly and Sommer, JJ., concur.

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37238

HARRIET A. RIFE, Appellee,	APPEAL FROM CIRCUIT COURT,
v.	COOK COUNTY.
WILLIAM H. RIFE, Appellant.	

275 I.A. 636

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

July 8, 1927, complainant, Harriet A. Rife, was granted a divorce from her husband, William H. Rife, defendant. By the terms of the decree property rights were settled between complainant and defendant by his conveyance to her of certain property and payment of $3,500 in her behalf in lieu of alimony. The decree contained a finding "that defendant has agreed to pay to said complainant the sum of $16 per week, in advance, for the support and education of his child, Ina Eunice Rife, until the further order of the court."

Pursuant to the decree defendant paid $16 a week for his daughter's support up to and including the month of August, 1931, which payments extended eight months beyond his daughter's attainment of her majority. January 8, 1933, an order was entered by the chancellor directing defendant to pay to complainant in the divorce proceeding $752 as and for support money for his daughter for a period of time after the child had reached her majority. Defendant prayed and perfected an appeal from this order. April 19, 1933, an order was entered by the chancellor requiring defendant to pay complainant $200 solicitor's fees for her defense of the above appeal.

27238

MARGARET A. RIKE, Appellee,	APPEAL FROM CIRCUIT COURT,
v.	COOK COUNTY.
WILLIAM H. RIKE, Appellant.	

275 I.A. 636

MR. MODIFYING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

July 8, 1927, complainant, Margaret A. Rike, was granted a divorce from her husband, William H. Rike, defendant. By the terms of the decree property rights were settled between complainant and defendant by his conveyance to her of certain property and payment of $3,300 in her behalf in lieu of alimony. The decree contained a finding "that defendant has agreed to pay to said complainant the sum of $10 per week, in advance, for the support and education of his child, Ina Eunice Rike, until the further order of the court."

Pursuant to the decree defendant paid $10 a week for his daughter's support up to and including the month of August, 1931, which payments extended eight months beyond his daughter's attainment of her majority. January 6, 1932, an order was entered by the chancellor directing defendant to pay to complainant in the divorce proceeding $750 as and for support money for his daughter for a period of time after the child had reached her majority. Defendant prayed and perfected an appeal from this order. April 18, 1932, an order was entered by the chancellor requiring defendant to pay complainant $250 solicitor's fee for her defense of the above appeal.

The original order of January 8, 1933, was reversed in Rife v. Rife, 272 Ill. App. 404, where we held that the chancellor had no power to order or compel defendant to pay support money for his daughter under the provisions of the Divorce act after she had reached her majority.

The order of April 19, 1933, allowing $200 solicitor's fees to complainant to defend the original appeal was reversed in an unpublished opinion filed December 29, 1933, by this division of the Appellate court for the first district in case No. 37156.

October 6, 1933, an order was entered by the chancellor allowing complainant $150 solicitor's fees to defend an appeal from the order of April 19, 1933, allowing her $200 solicitor's fees to defend the original appeal. This appeal is brought to reverse the order of October 6, 1933.

The court having no jurisdiction of the subject matter, it necessarily followed that the chancellor lacked authority to enter an order for solicitor's fees or for any other purpose. The order of October 6, 1933, allowing $150 solicitor's fees to complainant to defend the appeal in case No. 37156 is reversed. Both parties will be required to pay their own costs incurred in this court.

REVERSED.

Gridley and Scanlan, JJ., concur.

The original order of January 8, 1932, was reversed in Hite v. Hite, 272 Ill. App. 414, where we held that the chancellor had no power to order or compel defendant to pay support money for his daughter under the provisions of the divorce act after she had reached her majority.

The order of April 19, 1932, allowing $250 solicitor's fees to complainant to defend the original appeal was reversed in an unpublished opinion filed December 20, 1932, by this division of the appellate court for the first district in case No. 37182.

October 6, 1932, an order was entered by the chancellor allowing complainant $150 solicitor's fees to defend an appeal from the order of April 19, 1932, allowing her $250 solicitor's fees to defend the original appeal. This appeal is brought to reverse the order of October 6, 1932.

The court having no jurisdiction of the subject matter, it necessarily followed that the chancellor lacked authority to enter an order for solicitor's fees or for any other purpose. The order of October 6, 1932, allowing $150 solicitor's fees to complainant to defend the appeal in case No. 37182 is reversed. Both parties will be required to pay their own costs incurred in this court.

REVERSED.

Gridley and Scanlan, JJ., concur.

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37248

ROYAL A. DUKE,
Appellee,

v.

MANXI AND KOTTAS COMPANY, a corporation, (herein sued as Manxi-Kottas, Inc., a corporation,) ADAM MANXI, CHRIS KOTTAS, EDNA KOTTAS, JOHN DIMAS and CONSTANTINE P. PANUTSOS,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

275 I.A. 636

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for $630 rendered in favor of plaintiff, Royal A. Duke, and against defendants, Manxi and Kottas Company, a corporation, Adam Manxi and Chris Kottas, in a first class action in assumpsit, tried by the court without a jury. Edna Kottas, John Dimas and Constantine P. Panutsos were also made parties defendant to this action, but according to the judgment order the cause was dismissed as to them on plaintiff's motion. Shortly after the judgment was entered a motion was made to correct the judgment order to show that the trial court found the issues in favor of the last three named defendants and that the cause was not dismissed as to them on plaintiff's motion. This motion was denied. No brief has been filed in this court by plaintiff (appellee).

Plaintiff's statement of claim filed July 1, 1933, alleged that March 17, 1933, he was employed by defendants in

37246

ROYAL A. DUKE,
Appellee,

v.

MANKI AND KOTTAS COMPANY,
a corporation, (herein and
as Manki-Kottas, Inc., a
corporation,) ADAM MANKI,
GINEIR KOTTAS, ANNA KOTTAS,
JOHN SIMOS and CONSTANTINE
P. PANUTSOS,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

275 I.A. 636

MR. PRESIDING JUSTICE MCSULLAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for $250 rendered in favor of plaintiff, Royal A. Duke, and against defendants, Manki and Kottas Company, a corporation, Adam Manki and Gineir Kottas, in a first class action in assumpsit, tried by the court without a jury. Anna Kottas, John Simos and Constantine P. Panutsos were also made parties defendant to this action, but according to the judgment order the cause was dismissed as to them on plaintiff's motion. Shortly after the judgment was entered a motion was made to correct the judgment order to show that the trial court found the issues in favor of the last three named defendants and that the cause was not dismissed as to them on plaintiff's motion. This motion was denied. No brief has been filed in this court by plaintiff (appellee).

Plaintiff's statement of claim filed July 1, 1932, alleged that March 17, 1930, he was employed by defendants in

securing concessions to be operated at the Century of Progress Exposition; that he was so employed until May 15, 1933; and that on that date there was due him as wages a balance of $990.50 which defendants had failed and refused to pay him, and that he was entitled to an allowance of $200 attorney's fees.

July 22, 1933, plaintiff filed a bill of particulars which stated that he was employed by Adam Manxi in his own behalf and in behalf of all the other defendants; that the concessions referred to in his statement of claim were to be secured by Manxi and Chris Kottas by and through the aid and assistance of plaintiff; that the nature of the services rendered by plaintiff was driving the various defendants around in his automobile, contacting men and business firms with reference to supplies and fixtures to be used in the operation of the concessions; and that plaintiff's claim for services included gas and oil consumed in the operation of his car. By order of court plaintiff filed an additional bill of particulars August 10, 1933, which stated that he was employed at an agreed wage of $1.50 an hour, which wage was to include the use of his automobile and maintenance thereof, and that he worked twelve hours or more a day for fifty-six days.

All six defendants were served with summonses and filed separate affidavits of merits.

The affidavit of Adam Manxi denied that plaintiff was employed by defendants or any of them during the period from March 17, 1933, until May 15, 1933, or at any other time; that on May 15, 1933, there was due him as wages, while so engaged or on any other account, a balance of $990.50; and that there is or was due him from defendants or any of them any sum whatsoever. The affidavit then alleged that sometime in the spring of 1933,

securing concessions to be operated as the Century of Progress Exposition; that he was so employed until May 17, 1933; and that on that date there was due him as wages a balance of $900.00 which defendants had failed and refused to pay him, and that he was entitled to an allowance of $800 attorney's fees.

July 22, 1933, plaintiff filed a bill of particulars which stated that he was employed by Adam Kunzl in his own behalf and in behalf of all the other defendants; that the concessions referred to in his statement of claim were to be managed by Kunzl and Chris Kettas by and through the aid and assistance of plaintiff; that the duties of the services rendered by plaintiff was driving the various defendants around in his automobile, contacting men and business firms with reference to supplies and fixtures to be used in the operation of the concessions; and that plaintiff's claim for services included gas and oil consumed in the operation of his car. By order of court plaintiff filed an additional bill of particulars, August 10, 1933, which stated that he was employed at an agreed wage of $1.00 an hour, which wage was to include the use of his automobile and maintenance thereof, and that he worked twelve hours on each a day for fifty-six days.

All six defendants were served with summons and filed separate affidavits of merits.

The affidavit of Adam Kunzl stated that plaintiff was employed by defendants or any of them during the period from March 17, 1933, until May 17, 1933, or at any other time; that on May 17, 1933, there was due him as wages, while so engaged or on any other account, a balance of $900.00; and that there is or was due him from defendants or any of them any sum whatsoever.

The affidavit then alleged that something in the spring of 1933,

plaintiff, knowing that Manxi and defendant Chris Kottas were endeavoring to secure concessions at the Century of Progress Exposition, requested that he be allowed to accompany them as he was not employed; that, if they would furnish him with meals and a few incidental expenses, he would make no charge to Manxi or any of the defendants for the time so spent by him with them, and that he was furnished his meals and incidental expenses; and that defendants, nor any of them, are indebted in any sum to plaintiff.

Kottas, Dimas and Edna Kottas each filed an affidavit of merits which denied that he or she was indebted to plaintiff in the sum of $990.50 or any other sum, and that plaintiff was employed or rendered any service to him or her as alleged in plaintiff's statement of claim and bill of particulars.

The affidavit of merits filed by Panutsos in behalf of himself and the corporation defendant denied he was or is indebted to plaintiff in any sum; that he and the Manxi and Kottas Company, directly or indirectly, employed plaintiff as alleged by him; and that plaintiff rendered any service to them or either of them.

Defendants contend (1) that, inasmuch as this was a joint action on an express contract against six defendants who were all served with summonses and remained in the case as defendants until the court's finding, the judgment must be against all or none of them; (2) that the corporation defendant, the Manxi and Kottas Company, is not liable for services rendered or debts contracted before its incorporation; (3) that the judgment herein did not conform to the pleadings and proofs and was not in accordance with plaintiff's theory, upon which the pleadings were framed and the case tried; and (4) that, where an express contract of

plaintiff, knowing that Kunzl and defendant Carla Kotten were endeavoring to secure concessions at the Century of Progress Exposition, requested that he be allowed to accompany them as he was not employed; that, if they would furnish him with meals and a few incidental expenses, he would make no charge to Kunzl or any of the defendants for the time he spent by him with them, and that he was furnished his meals and incidental expenses; and that defendants, nor any of them, are indebted in any sum to plaintiff.

Kotten, Dimes and Dina Kotten each filed an affidavit or merits which denied that he or she was indebted to plaintiff in the sum of $990.00 or any other sum, and that plaintiff was employed or rendered any service to him or her as alleged in plaintiff's statement of claim and bill of particulars.

The affidavit of merits filed by Hermione in behalf of himself and the corporation defendant denied he was or is indebted to plaintiff in any sum; that he and the Kunzl and Kotten Company, directly or indirectly, employed plaintiff as alleged by him; and that plaintiff rendered any service to them or either of them.

Defendants contend (1) that, inasmuch as this was a joint action on an express contract against six defendants who were all served with summons and remained in the case as defendants until the court's finding, the judgment must be against all or none of them; (2) that the corporation defendant, the Kunzl and Kotten Company, is not liable for services rendered or obtained contracted before its incorporation; (3) that the judgment herein did not conform to the pleadings and proofs and was not in accordance with plaintiff's theory, upon which the pleadings were framed and the case tried; and (4) that, where an express contract of

employment is alleged as was here, recovery cannot be had on a quantum meruit or an implied contract.

Plaintiff testified in his own behalf that Manxi came to his home March 12, 1933, and "informed me that he was about ready - that he and his associates had an agreement to secure concessions at the Century of Progress grounds, and that he required my services. * * * One thing was to own an automobile and to act as chauffeur and to contact parties - to act as contact man, and to assist him in talking over the telephone and making contacts in connection with procuring fixtures and supplies to be used in their concessions at the Century of Progress grounds." In response to questions concerning the agreement as to compensation for his services, plaintiff answered: "Well, he asked me how much I wanted for my work under those conditions and I replied, a dollar and a half an hour. * * * He stated that was satisfactory."

Plaintiff testified further that pursuant to this agreement he purchased an automobile and commenced to work for Manxi and his associates March 17, 1933. He testified positively that he, with his automobile, was employed in driving various individual defendants for twelve or more hours each day for fifty-six days, driving some of them some days and others on other days, and that, outside of a few trips other than to the exposition grounds, his time was taken up mostly by trips to the concession and the Administration Building at the Century of Progress and waiting around for defendants.

All of the individual defendants testified that they had not employed or agreed to employ plaintiff, and those other than Manxi denied that Manxi had any authority to employ or agree to employ him in their behalf for $1.50 an hour or at any other rate. All of them admitted riding in plaintiff's automobile on occasions

employment is alleged as was here, recovery cannot be had on a quantum meruit or an implied contract.

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All of the individual defendants testified that they had not employed or agreed to employ plaintiff, and those other than found denied that found had any authority to employ or agree to employ him in their behalf for $1.50 an hour or at any other rate. All of them admitted riding in plaintiff's automobile on occasions

varying from once to a greater number of times. It appeared that plaintiff received meals gratis during the period involved at the Kottas restaurant; that on one occasion, at least, Edna Kottas secured sleeping accommodations for him for three weeks; that he received $17.50, April 24, 1933, for repairs to his car; and that for a period commencing May 14th or 15th, 1933, plaintiff was employed at the Kottas Roseland cafe for $12 a week.

Panutsos' undisputed testimony was to the effect that the defendant corporation, the Manxi and Kottas Company, did not receive its charter until May 11, 1933, and that its organization was not completed until sometime thereafter.

At the conclusion of all of the evidence the trial judge, in announcing his finding, stated: "I think the parties mostly concerned in this law suit are Manxi and Kottas. I don't think Mr. Kottas' wife has any obligation here either, but I think those two men actually - as far as your client (Manxi) is concerned, I don't think there is any question about it at all, Mr. Beach. * * * I am not going to give him $1200, however. I think that is too high. But this man worked for 7 weeks, and I will allow him 10 cents a mile for his car; that is what it would cost if the employment was hired, for a car. I will allow, for driving the car for 7 weeks. * ** I will allow 10 cents a miles for 3500 miles, $350. (Plaintiff testified to approximately this mileage.) And I will allow him $40 a week for 7 weeks, which is $630. Judgment will be entered against Mr. Kottas, Mr. Manxi and the Corporation. The other defendants will be dismissed."

As to the first contention of defendants that where a plaintiff chooses to sue several defendants jointly in a contract action and they all remain parties throughout the action the plaintiff must have a judgment against all of them or none, it

varying from once to a greater number of times. It appeared that plaintiff received meals gratis during the period involved at the Kottas restaurant; that on one occasion, at least, Mrs. Kottas secured sleeping accommodations for him for three weeks; that he received $17.50, April 24, 1933, for repairs to his car; and that for a period commencing May 14th or 15th, 1933, plaintiff was employed at the Kottas restaurant cafe for $12 a week.

Ramsdson' modified testimony was to the effect that the defendant corporation, the Mazzi and Kottas Company, did not receive its charter until May 11, 1934, and that its organization was not completed until sometime thereafter.

At the conclusion of all of the evidence the trial judge, in announcing his finding, stated: "I think the question merely concerned in this law suit are Mazzi and Kottas. I don't think Mr. Kottas' wife has any obligation here either, but I think these two men actually - as far as your client (Mazzi) is concerned, I don't think there is any question about it at all, Mr. Gasch. * * * I am not going to give him $1000, however. I think that is too high. Not this man worked for 7 weeks, and I will allow him 10 cents a mile for his car; what is that it would cost if the employment was mixed, for a car. I will allow, for driving the car for 7 weeks, * * * I will allow 10 cents a mile for 3500 miles, $350. (Plaintiff testified to approximately this mileage.) And I will allow him $40 a week for 7 weeks, which is $280. Judgment will be entered against Mr. Kottas, Mr. Mazzi and the Corporation. The other defendants will be dismissed."

As to the first contention of defendants that where a plaintiff chooses to sue several defendants jointly in a contract action and they all remain parties throughout the action the plaintiff must have a judgment against all of them or none, it

was, in our opinion, erroneous to enter a judgment against some of them only, unless the statement of claim was amended and the others properly dismissed out of the case.

Under the early decisions in this state in this character of action a plaintiff could not dismiss as to any one or more of the defendants and proceed to final judgment against the others. But in 1872 our legislature enacted section 39, chapter 110, Gahill's (1931) Revised Statutes, reading as follows:

> "At any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or joint defendant, changing the form of action, and in any matter, either of form or substance, in any process, pleading or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought or the defendant to make a legal defense."

Following the enactment of this statute our courts have held that in an action ex contractu against several defendants a plaintiff might dismiss asto one or more at any time during the trial and before final judgment and proceed to judgment against those remaining.

Our courts have said that the rule which was law prior to the enactment of section 39 of our Practice Act, namely, that in order to recover in an action ex contractu the action must be established against all of the defendants, and that a dismissal or discontinuance as to one or more codefendants effects a discontinuance as to the entire action so as to make a judgment against the remaining defendant or defendants erroneous, is subject to certain exceptions. One of these exceptions is where one is joined as a defendant in the action who is an improper or unnecessary party. This rule has been applied in cases where the proof showed that one or more of the defendants was not liable, and in such cases the dismissal of such defendant or defendants and the recovery of

was, in our opinion, erroneous to enter a judgment against some of them only, unless the abatement of claim was amended and the others properly dismissed out of the case.

Under the early decisions in this state in this character of action a plaintiff could not dismiss as to any one or more of the defendants and proceed to final judgment against the others. But in 1872 our legislature enacted section 76, chapter 110, Smith's (1921) Revised Statutes, reading as follows:

"At any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or joint defendant, changing the form of action, and in any matter, either of form or substance, in any process, pleading or proceeding which may enable the plaintiff to maintain the action for the claim for which it was intended to be brought or the defendant to make a legal defense."

Following the enactment of this statute our courts have held that in an action ex contractu against several defendants a plaintiff might dismiss as to one or more at any time during the trial and before final judgment and proceed to judgment against those remaining.

Our courts have said that the rule which was law prior to the enactment of section 76 of our statutes was, namely, that in order to recover in an action ex contractu the action must be established against all of the defendants, and that a dismissal or discontinuance as to one or more defendants effects a discontinuance as to the entire action so as to make a judgment against the remaining defendant or defendants erroneous, is subject to certain exceptions. One of these exceptions is where one is joined as a defendant in the action who is an improper or unnecessary party. This rule has been applied in cases where the proof showed that one or more of the defendants was not liable, and in such cases the dismissal of such defendant or defendants and the recovery of

judgment against the defendant or defendants remaining was upheld. (Teich et al. v. Ayer, 213 Ill. App. 41; Mayer v. Brensinger, 180 Ill. 110; Grand Pacific Hotel v. Pinkerton, 217 Ill. 61.)

Preceding the formal finding and judgment of the trial court in this cause October 11, 1933, the record presents an order that purports to have been entered on the same day dismissing the suit on plaintiff's motion as to Dimas, Panutsos and Edna Kottas. However, the bill of exceptions shows no such motion to have been made, and, further, that the trial court in announcing its finding at the conclusion of all the evidence on its own motion ordered the cause dismissed as to the three above mentioned defendants. The court was clearly in error in making a finding and entering a judgment in favor of some of the defendants and against others. Where a declaration or statement of claim charges a joint liability, and some of the defendants show that they were never liable, a recovery cannot be had against the others without dismissing the defendants not liable and amending the declaration or statement of claim by omitting the charge of joint liability as to those dismissed. (Umlauf v. Chacamas Trop. Prod. Co., et al., 209 Ill. App. 291.)

There is merit in defendants' second contention that a corporation is not liable for services rendered or debts contracted before its incorporation. The decided trend of the decisions of the courts of this state is that a corporation is not liable for debts contracted or services rendered under a contract with its incorporators prior to its organization, unless the corporation expressly promises to pay same after its organization. (Ward et al. v. Rapid Transit Co. of Ill., 206 Ill. App. 351.) A right of recovery against a corporation for anything done before it had a proper existence does not appear to rest on any very satisfactory

judgment against the defendant or defendants remaining was upheld. (Zalph et al. v. Ayer, 45 III. App. 41; Ayer v. Ehrenhanger, 180 III. 110; Grand Pacific Hotel v. Dickerson, 214 III. 61.)

Preceding the formal finding and judgment of the trial court in this cause October 11, 1933, the record presents an order that purports to have been entered on the same day dismissing the suit on plaintiff's motion as to Simms, Sanborn and John Doltan. However, the bill of exceptions shows no such motion to have been made, and, further, that the trial court in announcing its finding at the conclusion of all the evidence on its own motion ordered the cause dismissed as to the three above mentioned defendants. The court was clearly in error in making a finding and entering a judgment in favor of some of the defendants and against others. Have a declaration or statement of claim charges a joint liability, and some of the defendants show that they were never liable, a recovery cannot be had against the others without dismissing the defendants not liable and amending the declaration or statement of claim by omitting the charge of joint liability as to those dismissed. (Dalzell v. Consumers Ice, Fuel, Co., et al., 208 III. App. 491.)

There is merit in defendants' second contention that a corporation is not liable for services rendered or debts contracted before its incorporation. The decided trend of the decisions of the courts of this state is that a corporation is not liable for debts contracted or services rendered under a contract with its incorporators prior to its organization, unless the corporation expressly promises to pay some after its organization. (Ed et al. v. Rapid Transit Co., 21 III., 208 III. App. 321.) Rights of recovery against a corporation for anything done before it has a proper existence does not appear to rest on any very satisfactory

legal principle. (Rockford R. I. & St. L. R. R. Co. v. Sage, 65 Ill. 328.) It is undisputed that the services claimed to have been rendered in this cause were rendered before the complete organization of the Manxi and Kottas Company, and there was absolutely no evidence that the corporation expressly promised to pay for the alleged services of Duke after its organization. It was reversible error, in our opinion, for the trial court to enter a finding and judgment against the defendant corporation. It necessarily follows that if the judgment is reversed as to the corporation it will have to be reversed as to the other defendants. The Supreme Court of this state has held for over eighty years, beginning with McDonald v. Wilkie, 13 Ill. 22, that a judgment against several defendants, whether rendered in a tort action or on a contract, is a unit and cannot be reversed as to one or more defendants and affirmed as to others. (Livak v. Chicago & Erie R. R. Co., 299 Ill. 218; Seymour v. Richardson Fueling Co., 205 Ill. 77.)

Defendants' third and fourth contentions are equally meritorious.

Plaintiff's statement of claim and bill of particulars were predicated upon and his proofs tended to show only an express contract for the services of himself, with his automobile, at the rate of $1.50 an hour for twelve or more hours a day for fifty-six days. We have carefully read the record and fail to discover anything therein that warranted the trial judge in finding in plaintiff's favor on a theory wholly inconsistent with that advanced by him. There is nothing in the record to justify the court's finding that plaintiff was entitled to receive 10¢ a mile for 3500 miles for the use of his automobile or $40 a week for seven weeks. It is true that in a fourth class action in the Municipal

legal principle. (Hoskford M. I. & Co. I. R. R. Co. v. Sage, 65 Ill. 328.) It is maintained that the services claimed to have been rendered in this cause were rendered before the complete organization of the Mount and Ashton Company, and there was absolutely no evidence that the corporation expressly promised to pay for the alleged services of Tuke after its organization. It was reversible error, in our opinion, for the trial court to enter a finding and judgment against the defendant corporation. It necessarily follows that if the judgment is reversed as to the corporation it will have to be reversed as to the other defendants. The Supreme Court of this state has held for over eighty years, beginning with McDonald v. Illinois, 13 Ill. 29, that a judgment against several defendants, whether rendered in a tort action or on a contract, is a unit and cannot be reversed as to one or more defendants and affirmed as to others. (Lyon v. Chicago & Rock R. R. Co., 299 Ill. 218; Peterson v. Schwabacher Mailing Co., 308 Ill. 77.)

Defendants' third and fourth contentions are equally meritorious.

Plaintiff's statement of claim and bill of particulars were predicated upon and his proofs tended to show only an express contract for the services of himself, his wife respectively, at the rate of $1.50 an hour for twelve or more hours a day for fifty-six days. We have carefully [illegible] and fail to discover anything therein that warrants the trial judge in finding in plaintiff's favor on a theory totally inconsistent and at the odds with that advanced by him. There is nothing in the record to justify the court's finding that plaintiff was entitled to receive $4 a mile for 3800 miles for the use of his automobile or $40 a week for seven weeks. It is true that in a jury case action in the municipal

court ~~xxxxx~~ the case is made by the evidence presented but this is a first class action in which plaintiff alleged and sought to prove the express contract for his services as heretofore stated, and we know of no rule of law that authorized the court to substitute a different contract and a measure of damages entirely at variance with the pleadings and proof for that alleged and sought to be proven.

In an action of the first class in the Municipal court the theory of the statement of claim must appear from the allegations in it. The judgment must be secundum allegata et probata and unless the pleadings and proof authorize the finding and judgment, the judgment is unwarranted.

It is too well settled to require the citation of authorities that, there having been an express contract, there cannot be a recovery on an implied one. (Brougham v. Paul, 138 Ill. App. 455.) An implied contract cannot exist where there is an express one about the same subject matter. It is only where the parties do not expressly agree that the law implies a promise. (Siegel v. Borland, 191 Ill. 108.) This doctrine has never been departed from in this state and the trial court was precluded in this cause from predicating its finding either on a quantum meruit or an implied contract.

For the reasons indicated herein the judgment of the Municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Scanlan, JJ., concur.

court xxxxxx the case is made by the evidence presented but this is a first class action in which plaintiff alleged and sought to prove the express contract for his services as hereinbefore stated, and we know of no rule of law that authorized the court to substitute a different contract and a measure of damages entirely at variance with the pleadings and proof for that alleged and sought to be proven.

In an action of the first class in the municipal court the theory of the statement of claim must appear from the allegations in it. The judgment must be according allegata et probata and unless the pleadings and proof authorize the finding and judgment, the judgment is unwarranted.

It is too well settled to require the citation of authorities that, there having been an express contract, there cannot be a recovery on an implied one. (Brownlee v. Ball, 138 Ill. App. 485.) An implied contract cannot exist where there is an express one about the same subject matter. It is only where the parties do not expressly agree that the law implies a promise. (Alcorn v. Burland, 141 Ill. 108.) This doctrine has never been departed from in this state and the trial court was precluded in this case from predicating its finding either on a quantum meruit or an implied contract.

For the reasons indicated herein the judgment of the municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Boman, JJ., concur.

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UNIVERSITY OF CHICAGO, a corporation, Appellee,	INTERLOCUTORY
v.	APPEAL FROM CIRCUIT COURT,
GEORGE R. DATER et al., on appeal of R. W. JOHNSTON, Appellant.	COOK COUNTY.

275 I.A. 637

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

R. W. Johnston, one of the defendants (hereinafter referred to as defendant), prosecutes this interlocutory appeal from an ex parte order of the Circuit court entered December 30, 1933, appointing a receiver for the premises described in the trust deed upon which foreclosure proceedings had been instituted December 29, 1933.

December 29, 1933, plaintiff, the University of Chicago, filed its bill to foreclose the premises in question, alleging inter alia that on December 1, 1928, George R. Dater and Nellie E. Dater, his wife, and Clara A. Price and John R. Price, her husband, executed one principal promissory note for $75,000, due December 1, 1933, with interest at 5-3/4% per annum, payable semiannually June 1 and December 1 of each year; that interest coupon No. 9 for $2,156.25 became due June 1, 1933, and interest coupon No. 10 for $2,156.25, together with the principal note for $75,000, was due and payable December 1, 1933; that notice was given to and demand for payment made of George R. Dater and Nellie E. Dater, his wife, and John R. Price and Clara A. Price, his wife, but that no part of same has been paid; that subsequent

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UNIVERSITY OF CHICAGO, a corporation, Appellee,	
v.	INTERLOCUTORY
GEORGE R. BATER et al., on appeal of R. W. JOHNSTON, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

215 I.A. 637

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December 29, 1933, plaintiff, the University of Chicago, filed its bill to foreclose the premises in question, alleging inter alia that on December 1, 1928, George R. Bater and Nellie E. Bater, his wife, and Clara A. Price and John R. Price, her husband, executed one principal promissory note for $75,000, due December 1, 1933, with interest at 5-3/4% per annum, payable semi-annually June 1 and December 1 of each year; that interest coupon No. 9 for $2,156.25 became due June 1, 1933, and interest coupon No. 10 for $2,156.25, together with the principal note for $75,000, was due and payable December 1, 1933; that notice was given to and demand for payment made of George R. Bater and Nellie E. Bater, his wife, and John R. Price and Clara A. Price, his wife, but that no part of same has been paid; that subsequent

to the execution of such note and trust deed, the note was purchased by plaintiff for a valuable consideration and that it is now the legal owner and holder of said principal note and interest coupons Nos. 9 and 10; that as security for such indebtedness George R. and Nellie E. Dater, and John R. and Clara A. Price, did, on December 1, 1928, convey to the Chicago Title & Trust Company, as trustee, the premises described in the trust deed, which are located at the southeast corner of 60th street and Dorchester avenue, Chicago, Illinois, together with the rents, issues and profits therefrom, in trust, for the purpose of securing the payment of the principal note and interest coupons to the holder thereof, which trust deed was duly acknowledged and recorded; that some time after the execution of the note and trust deed John R. Price died; that interest coupons Nos. 1 to 8, both inclusive, have been paid and cancelled; that the principal promissory note and interest coupons Nos. 9 and 10, aggregating $79,312.50, have not been paid; that the premises conveyed by the trust deed are poor and scant security for the amount due plaintiff; that George R. Dater, Nellie E. Dater and Clara A. Price are unable to pay the amount due under the terms of the trust deed; and that various persons, including "unknown owners" and R. W. Johnston, be made parties defendant. Included in the relief sought by the bill was the appointment of a receiver. The bill concluded with the following form of verification:

"State of Illinois }
County of Cook }ss

George O. Fairweather, being first duly sworn, on oath deposes and says that he is the Assistant Treasurer of the University of Chicago, complainant herein, and is the duly authorized agent in this behalf of said complainant; that he has read the foregoing bill of complaint, knows the contents thereof, and that the same are true, except as to such matters and things, if any, stated on information and belief, and as to the latter he believes

to the execution of such note and trust deed, the note was purchased by plaintiff for a valuable consideration and that it is now the legal owner and holder of said principal note and interest coupons Nos. 9 and 10; that as security for such indebtedness George R. and Hellie R. Dater, and John R. and Clara A. Price, did, on December 1, 1923, convey to the Chicago Title & Trust Company, as trustee, the premises described in the trust deed, which are located at the southeast corner of 60th street and Dorchester avenue, Chicago, Illinois, together with the rents, issues and profits thereform, in trust, for the purpose of securing the payment of the principal note and interest coupons to the holder thereof, which trust deed was duly acknowledged and recorded; that some time after the execution of the note and trust deed John R. Price died; that interest coupons Nos. 1 to 8, both inclusive, have been paid and cancelled; that the principal promissory note and interest coupons Nos. 9 and 10, aggregating $79,312.50, have not been paid; that the premises conveyed by the trust deed are poor and ample security for the amount due plaintiff; that George R. Dater, Hellie R. Dater and Clara A. Price are unable to pay the amount due under the terms of the trust deed; and that various persons, including "unknown owners" and E. A. Johnston, be made parties defendant. Included in the relief sought by the bill was the appointment of a receiver. The bill concluded with the following form of verification:

"State of Illinois }
County of Cook } ss

George O. Patrenchier, being first duly sworn, on oath deposes and says that he is the Assistant Treasurer of the University of Chicago, complainant herein, and is the duly authorized agent in this behalf of said complainant; that he has read the foregoing bill of complaint, knows the contents thereof, and that the same are true, except as to such matters and things, if any, stated on information and belief, and as to the latter he believes

them to be true.

George O. Fairweather.

Subscribed and sworn to before me this 29th day of December, 1933,

Howard H. Moore,

(Notarial Seal) Notary Public."

December 30, 1933, plaintiff filed a petition for the appointment of a receiver for the property, the material allegations of which were that its bill of complaint was filed December 29, 1933, to foreclose the first mortgage trust deed against the property known as the southeast corner of 60th street and Dorchester avenue; that the total indebtedness due plaintiff, together with unpaid taxes of $2,491.08 for the year 1931 and accrued interest of $4,312.50 to December 1, 1933, amounts to approximately $81,803.58; that the owners of the property, George R. Dater and Nellie E. Dater, his wife, and Clara A. Price, widow of John R. Price, deceased, have failed to pay the taxes for the year 1931, as a result of which tax liens against the property and penalties for the nonpayment of such taxes have accrued and are accruing from month to month as a result thereof; that the property conveyed as security for such indebtedness by said trust deed is a piece of land having a frontage of 100 feet on 60th street and a depth of 150 feet on Dorchester avenue, and is improved with two four story and basement brick, cement block front, steam heated apartment buildings, approximately forty-five years of age, containing fifty-two apartments, divided as follows: twenty six and seven room apartments, thirty-two three and four room apartments; that it has examined the property and caused an appraisal to be made and that said land at the present time is worth not more than $36,950, and the buildings and improvements thereon not more than $30,625, making a total value at this time of the property of not to exceed $67,575; that the property has an estimated net annual income of $620, which is grossly inadequate to meet the charges for taxes,

them to be true.

George O. Mairosenker,

Subscribed and sworn to before me this 6th day of December, 1933.

Howard H. Moore,

(Notarial Seal) Notary Public."

December 30, 1933, plaintiff filed a petition for the appointment of a receiver for the property, the material allegations of which were that its bill of complaint was filed December 29, 1933, to foreclose the first mortgage trust deed against the property known as the southeast corner of 60th street and Dorchester avenue; that the total indebtedness due plaintiff, together with unpaid taxes of $3,491.00 for the year 1931 and accrued interest of $4,318.90 to December 1, 1933, amounts to approximately $1,805.98; that the owners of the property, George H. Meier and Nellie S. Meier, his wife, and Clara A. Price, widow of John [illegible] Price, deceased, have failed to pay the taxes for the year 1931, as a result of which tax liens against the property and penalties for the nonpayment of such taxes have accrued and are accruing from month to month as a result thereof; that the property conveyed as security for such indebtedness by said trust deed is a piece of land having a frontage of 100 feet on 60th street and a depth of 180 feet on Dorchester avenue, and is improved with two four story and basement brick, common block front, steam heated apartment buildings, approximately forty-five years of age, containing fifty-two apartments, divided as follows: twenty six and seven room apartments, thirty-two three and four room apartments; that it has examined the property and caused an appraisal to be made and that said land at the present time is worth not more than $[illegible], and the buildings and improvements thereon not more than $[illegible], making a total value at this time of the property of not to exceed $[illegible]; that the property has an estimated net annual income of $[illegible], which is grossly inadequate to meet the charges for taxes,

interest, etc., and which is grossly insufficient for the payment of even the taxes on the property without including the interest on the mortgage indebtedness and operating expenses; that the property is grossly inadequate as security for the indebtedness and that since the trust deed here involved conveyed in addition to the property the rents, issues and profits thereof as security for the indebtedness, a receiver should be appointed to collect such rents, issues and profits and preserve the same for the benefit of plaintiff, subject to the further order of the court; and prayed for the appointment of a receiver. The petition concluded with a verification similar in form to the verification of the bill of complaint heretofore set forth.

On the same day, December 30, 1933, the court entered an order in which it found that the bill of complaint and petition for the appointment of a receiver were duly verified, and that both record owners and the owners of the equity were nonresidents of the State of Illinois and resided in the State of Michigan; that the premises described in the trust deed sought to be foreclosed are scant and inadequate security for the trust deed now constituting a lien against the premises; that, being fully advised in the premises and having heard the arguments and representations of counsel, for good cause shown, a receiver should be appointed for the premises without notice to the defendants; and ordered that one Frank J. O'Brien be appointed receiver of the property with the usual powers and duties of such.

Thereafter, January 13, 1934, defendant R. W. Johnston, filed a petition to vacate the order of December 30, 1933, appointing the receiver, in which he alleged that he was one of the defendants; that he was one of the owners of the equity of redemption and had

interest, etc., and which is grossly insufficient for the payment of even the taxes on the property without including the interest on the mortgage indebtedness and operating expenses; that the property is grossly inadequate as security for the indebtedness and that since the trust deed here involved conveyed in addition to the property the rents, issues and profits thereof as security for the indebtedness, a receiver should be appointed to collect such rents, issues and profits and preserve the same for the benefit of plaintiff, subject to the further order of the court; and prayed for the appointment of a receiver. The petition concluded with a verification similar in form to the verification of the bill of complaint heretofore set forth.

On the same day, December 30, 1932, the court entered an order in which it found that the bill of complaint and petition for the appointment of a receiver were duly verified, and that both record owners and the owners of the equity were nonresidents of the State of Illinois and resided in the State of Michigan; that the premises described in the trust deed sought to be foreclosed are vacant and inadequate security for the trust deed now constituting a lien against the premises; that, being fully advised in the premises and having heard the arguments and representations of counsel, for good cause shown, a receiver should be appointed for the premises without notice to the defendants; and ordered that one Frank J. O'Brien be appointed receiver of the property with the usual powers and duties of such.

Thereafter, January 13, 1934, defendant E. K. Johnston, filed a petition to vacate the order of December 30, 1933, appointing the receiver, in which he alleged that he was one of the defendants; that he was one of the owners of the equity of redemption and had

a half interest in same, and was the agent for the owner of the other half interest in the equity; that he was then and for more than two years last past had been the agent in possession of said premises, collecting rents and managing the property; that said fact was well known to plaintiff because petitioner had many conferences with officers of plaintiff in connection with the property; that, notwithstanding such knowledge that he was in possession and control of the premises, collecting rents, and that he was the duly authorized agent of the owners of the equity and an owner in his own name of one-half interest in the property, plaintiff made application for the appointment of a receiver without serving notice of any kind on him or on any one on the premises; that he believes that plaintiff advised the court that all of the defendants were located outside of the State and could not be served with notice, and that upon such representation the court appointed the receiver; that the receiver has attempted to oust him from possession of the property, has attempted to collect rents for the period preceding the time he was appointed and has otherwise greatly disturbed the tenancy in the premises; that some of the apartments in the building are furnished and that he is the owner of the furniture; that part of the consideration paid for the rent of such apartments is based on the fact that they are so furnished and that, therefore, the order appointing the receiver should be vacated and that he should be allowed to remain in possession of the premises, under bond, to collect the rents and account to the court for all receipts and disbursements.

January 16, 1934, plaintiff filed its answer to the aforesaid petition, which denied that defendant is one of the owners of the equity of redemption or that he has a half interest in such equity or that he, at any time, represented to complainant

a half interest in same, and was the agent for the owner of the other half interest in the equity; that he was then and for more than two years last past had been the agent in possession of said premises, collecting rents and managing the property; that said fact was well known to plaintiff because petitioner had many conferences with officers of plaintiff in connection with the property; that, notwithstanding such knowledge that he was in possession and control of the premises, collecting rents, and that he was the duly authorized agent of the owners of the equity and an owner in his own name of one-half interest in the property, plaintiff made application for the appointment of a receiver without serving notice of any kind on him or on any one on the premises; that he believes that plaintiff advised the court that all of the defendants were located outside of the state and could not be served with notice, and that upon such representation the court appointed the receiver; that the receiver has attempted to oust him from possession of the property, has attempted to collect rents for the period preceding the time he was appointed and has otherwise grossly disturbed the tenancy in the premises; that some of the apartments in the building are furnished and that he is the owner of the furniture; that part of the consideration paid for the rent of such apartments is based on the fact that they are so furnished and that, therefore, the order appointing the receiver should be vacated and that he should be allowed to remain in possession of the premises, under bond, to collect the rents and account to the court for all receipts and disbursements.

January 16, 1936, plaintiff filed its answer to the aforesaid petition, which denied that defendant is one of the owners of the equity of redemption or that he has a half interest in such equity or that he, at any time, represented to complainant

that he owned any interest in the property. The answer admits that for some time defendant had been acting as agent for the owners of the property and that he had theretofore had certain conferences and conversations with various officers of plaintiff. The answer then alleges that in such conferences defendant repeatedly stated that George R. Dater, Nellie E. Dater and Clara A. Price, all residents of Benton Harbor, Michigan, were the owners of the property; that he had no authority in connection with same except as agent to collect the rents and manage the property; and that he had stated that all questions and matters pertaining to the property must be taken up with the owners in Michigan.

The answer also alleged that plaintiff, when it presented its petition for the appointment of a receiver to the court, advised the court that both record owners and the owners of the equity of the property were nonresidents of the State of Illinois and lived in Benton Harbor, Michigan; that the fair value of the property was in the neighborhood of $20,000 less than the amount due and owing to plaintiff; that the property was poorly managed and in a run down condition; and that plaintiff had served no notice of its motion, but felt that there was ample and good cause shown why a receiver should be appointed without notice. It then alleged that the order appointing the receiver recites that it was entered without notice to the owners and finds that the premises are scant and inadequate security; and that for good cause shown a receiver should be appointed for the premises without notice.

The answer further avers that for a considerable period of time the building had been under the management of defendant as agent for the owners; that it had been allowed to run down and deteriorate and become to a large extent vacant and unoccupied; that, when the receiver took possession of the property shortly

that he owned any interest in the property. The answer admits that for some time defendant had been acting as agent for the owners of the property and that he had therefore had certain conferences and conversations with various officers of plaintiff. The answer then alleges that in such conferences defendant repeatedly stated that George H. Baker, Willis G. Baker and Chas. A. Price, all residents of Benton Harbor, Michigan, were the owners of the property; that he had no authority in connection with same except as agent to collect the rents and manage the property; nor that he had stated that all questions and matters pertaining to the property must be taken up with the owners in Michigan.

The answer also alleged that plaintiff, when it presented its petition for the appointment of a receiver to the court, advised the court that both record owners and the owners of the equity of the property were nonresidents of the State of Illinois and lived in Benton Harbor, Michigan; that the fair value of the property was in the neighborhood of $20,000 less than the amount due and owing to plaintiff; that the property was poorly managed and in a run down condition; and that plaintiff had served no notice of its motion, but felt that there was ample and good cause shown why a receiver should be appointed without notice. It then alleged that the order appointing the receiver recited that it was entered without notice to the owners and that the premises are badly and inadequate security; and that for good cause shown a receiver should be appointed for the premises without notice.

The answer further avers that for a considerable period of time the building had been under the management of defendant as agent for the owners; that it had been allowed to run down and deteriorate and become to a large extent vacant and unoccupied; that, when the receiver took possession of the property shortly

after December 30, 1933, twenty-eight of the apartments were wholly vacant and unoccupied, two of the apartments were occupied by defendant as office and living quarters without the payment of rent therefor, one of the apartments was occupied by a tenant who paid no rent and claimed to have been doing painting around the premises as payment for his rent, six of the apartments were occupied by tenants who were in arrears in rent from $249 to $574.56; that monthly rentals of such apartments range from $20 to $45; that only fifteen out of the fifty-two apartments were occupied by tenants who were paying rent regularly and promptly; that, if the property were properly and efficiently managed, it should bring a gross rental of approximately $1,200 a month, whereas the gross rentals for the month of January amounted to only $254; that Johnston was informed promptly by the receiver of the latter's appointment as such; that, notwithstanding the fact that Johnston assured the receiver that he would make no further collections of rent, he disregarded and defied the order appointing the receiver and has collected rents from certain tenants and failed and refused to turn them over to the receiver; that it owns several buildings in the vicinity, not more than one or two blocks from the property here involved, of the same general age, kind and character; that such buildings are approximately 100% rented by desirable tenants who are paying rents; that, in the opinion of plaintiff, this property, if efficiently and properly managed, can be made to produce gross rentals of approximately $1,200 a month; and that Johnston has been charging the owners of the property $200 a month as compensation for managing the property, and that said amount is exorbitant and unreasonable and is almost 100% of the gross rentals collected from the property prior to the appointment of the receiver.

The answer further avers that at the time of the filing

after December 30, 1932, twenty-eight of the apartments were wholly vacant and unoccupied, two of the apartments were occupied by defendant as offices and living quarters without the payment of rent therefor, one of the apartments was occupied by a tenant who paid no rent and claimed to have been doing painting around the premises as payment for his rent, six of the apartments were occupied by tenants who were in arrears in rent from $450 to $574.50; that monthly rentals of such apartments range from $30 to $48; that only fifteen out of the fifty-two apartments were occupied by tenants who were paying rent regularly and promptly; that, if the property were properly and efficiently managed, it should bring a gross rental of approximately $1,500 a month, whereas the gross rentals for the month of January amounted to only $724; that Johnston was informed promptly by the receiver of the latter's appointment as such; that, notwithstanding the fact that Johnston assured the receiver that he would make no further collections of rent, he disregarded and violated the order appointing the receiver and has collected rents from certain tenants and failed and refused to turn them over to the receiver; that it owns several buildings in the vicinity, not more than one or two blocks from the property here involved, of the same general age, kind and character; that such buildings are approximately 100% rented by desirable tenants who are paying rents; that, in the opinion of plaintiff, this property, if efficiently and properly managed, can be made to produce gross rentals of approximately $1,500 a month; and that Johnston has been charging the owners of the property $100 a month as compensation for managing the property, and that such amount is exorbitant and unreasonable and is almost 100% of the gross rentals collected from the property prior to the appointment of the receiver.

The answer further avers that at the time of the filing

of the petition for the appointment of a receiver the record title to the property, according to the records of the office of the Recorder of Deeds of Cook County, stood in the name of George R. Dater and Clara A. Price; that on information and belief it charges the fact to be that if there has been any conveyance of any interest in this property to Johnston it was made subsequent to the filing of the bill of complaint and to the filing of the petition for the appointment of a receiver, and to the entry of the order appointing the receiver; that such conveyance, if any, is a subterfuge and made for the purpose of misleading the court and obstructing the rights and relief of complainant; that George R. Dater and Nellie E. Dater and Clara A. Price, the real owners of the equity of redemption are nonresidents of the State of Illinois and have entered no appearance, and that it would be inequitable to grant the relief prayed in view of the fact that there will undoubtedly be a substantial deficiency decree entered herein. The answer concluded with a verification similar to that heretofore set forth.

Defendant's theory is that the order appointing the receiver and the order denying his petition to vacate the order appointing the receiver were erroneous (1) because there is no basis in the bill of complaint, the petition for the appointment of the receiver or the order for the appointment of the receiver for such appointment, either with or without notice; and (2) because the court abused its discretion in refusing to allow him to furnish a bond in lieu of the appointment of a receiver.

Plaintiff's theory is that the facts set forth in the verified petition for the appointment of a receiver are not only sufficient to support the order appointing the receiver but required such order; and that the facts before the trial court both at the time of the appointment of the receiver and at the subsequent

of the petition for the appointment of a receiver the record title to the property, according to the records of the office of the Recorder of Deeds of Cook County, stood in the name of George W. Deter and Clara A. Price; that on information and belief it charges the fact to be that if there has been any conveyance of any interest in this property to Johnson it was made subsequent to the filing of the bill of complaint and to the filing of the petition for the appointment of a receiver, and to the entry of the order appointing the receiver; that such conveyance, if any, is a subterfuge and made for the purpose of misleading the court and obstructing the rights and relief of complainant; that George W. Deter and Nellie W. Deter and Clara A. Price, the real owners of the equity of redemption are nonresidents of the State of Illinois and have entered no appearance, and that it would be impossible to grant the relief prayed in view of the fact that there will undoubtedly be a substantial deficiency decree entered herein. The answer concluded with a verification similar to that heretofore set forth.

Defendant's theory is that the order appointing the receiver and the order denying his petition to vacate the order appointing the receiver were erroneous (1) because there is no basis in the bill of complaint, the petition for the appointment of the receiver or the order for the appointment of the receiver for such appointment, either with or without notice; and (2) because the court abused its discretion in refusing to allow him to furnish a bond in lieu of the appointment of a receiver.

Plaintiff's theory is that the facts set forth in the verified petition for the appointment of a receiver are not only sufficient to support the order appointing the receiver but required such order; and that the facts before the trial court both at the time of the appointment of the receiver and at the subsequent

hearing on defendant's petition to vacate the order appointing the receiver, showed conclusively that plaintiff was entitled to a receiver to protect the property and conserve the income therefrom.

In support of his theory defendant contends (1) that the allegations of the bill of complaint to foreclose and the petition for the appointment of a receiver being upon "information and belief" are of no evidentiary value and are insufficient as a basis upon which to predicate an order appointing a receiver; (2) that it is improper to appoint a receiver without notice to a known agent of the owners in possession of the premises; (3) that his motion to vacate the order appointing the receiver did not waive his objection that the receiver was appointed without notice, inasmuch as his motion was restricted to the question of the failure to give notice; and (4) that the mere stipulation in the trust deed for the appointment of a receiver upon default in the payment of the indebtedness secured by same and the pledge therein of the rents, issues and profits as additional security were not sufficient justification for the appointment of a receiver.

It is true that there was no allegation in either the bill of complaint or the petition for the appointment of the receiver to sustain the finding of the court in the order appointing the receiver that the record owners of the property, who were the real owners of the equity, were not residents of the State of Illinois but resided in the State of Michigan. Whatever impropriety there was in that finding is not material on this appeal, inasmuch as it was conceded on the hearing on the merits on defendant's petition to vacate the order that at the time the bill of complaint and plaintiff's petition for the appointment of a receiver were filed, as well as at the time the receiver was appointed, all of the record owners, who were the real owners,

hearing on defendant's petition to vacate the order appointing the receiver, showed conclusively that plaintiff was entitled to a receiver to protect the property and conserve the income therefrom.

In support of his theory defendant contends (1) that the allegations of the bill of complaint to foreclose and the petition for the appointment of a receiver being upon "information and belief" are of no evidentiary value and are insufficient as a basis upon which to predicate an order appointing a receiver; (2) that it is improper to appoint a receiver without notice to a known agent of the owners in possession of the premises; (3) that his motion to vacate the order appointing the receiver did not waive his objection that the receiver was appointed without notice, inasmuch as his motion was restricted to the question of the failure to give notice; and (4) that the mere stipulation in the trust deed for the appointment of a receiver upon default in the payment of the indebtedness secured by same and the pledge therein of the rents, issues and profits as additional security were not sufficient justification for the appointment of a receiver.

It is true that there was no allegation in either the bill of complaint or the petition for the appointment of the receiver to sustain the finding of the court in the order appointing the receiver that the record owners of the property, who were the real owners of the equity, were not residents of the State of Illinois but resided in the State of Michigan. Whatever improprietry there was in that finding is not material on this appeal, inasmuch as it was conceded on the hearing on the merits on defendant's petition to vacate the order that at the time the bill of complaint and plaintiff's petition for the appointment of a receiver were filed, as well as at the time the receiver was appointed, all of the record owners, who were the real owners,

resided in the State of Michigan.

Positive allegations of the petition for the appointment of a receiver fully supported the finding of the court ~~that~~ in its order appointing the receiver that "the premises in question are scant and inadequate security for the trust deed now constituting a lien against said premises, namely, the trust deed herein sought to be foreclosed."

As to defendant's first contention that the order appointing the receiver is void because the verification of the petition for such appointment was upon "information and belief," it is sufficient to state that no alleged error in this regard is included in his assignment of errors. In any event, defendant was accorded a full hearing on the merits in the trial court on the question of the propriety of the appointment of the receiver and no objection was raised during such hearing as to the form or sufficiency of the verification to the petition for the appointment of a receiver, although the court and counsel referred to the petition to appoint a receiver as properly verified and so considered it. If defendant had any objection to raise as to the verification of the petition he should have done so in the court below, where any irregularity or defect therein might have been cured readily by amendment. It is too well settled to require citation of authority that the sufficiency of a verification to a pleading cannot be questioned for the first time on appeal.

Under the record presented we find no merit in defendant's second contention that the court erred in appointing a receiver without notice to defendant. If plaintiff's failure to notify defendant of the application for the appointment of a receiver was erroneous, such error was obviated by the full hearing on the merits as to the propriety of the receiver's appointment. When a hearing

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As to defendant's first contention that the order appointing the receiver is void because the verification of the petition for such appointment was upon "information and belief," it is sufficient to state that no alleged error in this regard is included in his assignment of errors. In any event, defendant was accorded a full hearing on the merits in the trial court on the question of the propriety of the appointment of the receiver and no objection was raised during such hearing as to the form or sufficiency of the verification to the petition for the appointment of a receiver, although the court and counsel referred to the petition to appoint a receiver as properly verified and so considered it. If defendant had any objection to raise as to the verification of the petition he should have done so in the court below, where any irregularity or defect therein might have been cured readily by amendment. It is too well settled to require citation of authority that the sufficiency of a verification to a pleading cannot be questioned for the first time on appeal.

Under the record presented we find no merit in defendant's second contention that the court erred in appointing a receiver without notice to defendant. If plaintiff's failure to notify defendant of the application for the appointment of a receiver was erroneous, such error was obviated by the full hearing on the merits as to the propriety of the receiver's appointment. Upon a hearing

on the merits is afforded on a petition to vacate an order appointing a receiver, it is well established that the original failure to give notice is immaterial since the only purpose of requiring notice is to give the party a hearing.

Defendant's third contention that his motion to vacate the order appointing the receiver did not waive his objection that the receiver was appointed without notice, because his motion was restricted to the question of the failure to give notice, is refuted by his petition to vacate the appointment of the receiver, wherein it was alleged, in addition to the failure of plaintiff to give him notice as the owner of a half interest in the property and as the agent for the owner of the other half interest, that the receiver was attempting to oust him from the premises, was attempting to collect rents for the premises for the period prior to his appointment and was otherwise disturbing the tenancy, and that defendant's furniture was used in some of the apartments, part of the rent for which was for such use of his furniture.

It developed on the hearing on defendant's petition to vacate the appointment of the receiver that a 41/99 interest in the premises had been conveyed to defendant several days after the receiver was appointed for $10, and, as testified to by him, the additional consideration of about $1,000 owed to him by one of the owners of the equity, and he testified that he was the agent for the owner of the remaining interest in the property. He also testified, without any apparent knowledge of or qualifications as to real estate values, that the property was worth $150,000. No testimony was offered by him to sustain the other allegations of his petition to vacate. Defendant did not restrict his motion to the question of notice and if he was entitled to notice, which we doubt, inasmuch as he had no interest in the property at the time of the appointment

on the motion is decided on a petition to vacate an order appointing a receiver, it is well established that the original failure to give notice is immaterial since the only purpose of requiring notice is to give the party a hearing.

Defendant's third contention that his motion to vacate the order appointing the receiver did not waive his objection that the receiver was appointed without notice, because his motion was restricted to the question of the failure to give notice, is refuted by his petition to vacate the appointment of the receiver, wherein it was alleged, in addition to the failure of plaintiff to give him notice as the owner of a half interest in the property and as the agent for the owner of the other half interest, that the receiver was attempting to oust him from the premises, was attempting to collect rents for the premises for the period prior to his appointment and was otherwise disturbing the tenancy, and that defendant's furniture was used in some of the apartments, part of the rent for which was for such use of his furniture.

It developed on the hearing on defendant's petition to vacate the appointment of the receiver that a half interest in the premises had been conveyed to defendant several days after the receiver was appointed for $10, and, as testified to by him, the additional consideration of about $1,000 owed to him by one of the owners of the equity, and he testified that he was the agent for the owner of the remaining interest in the property. He also testified, without any apparent knowledge of or qualifications as to real estate values, that the property - a corner lot,000. No testimony was offered by him to explain the other allegations of his petition to vacate. Defendant did not restrict his motion to the question of notice and if he was entitled to notice, which we doubt, inasmuch as he had no interest in the property at the time of the appointment

of the receiver upon which objection to such appointment might be predicated, he waived any such right by advising the trial court that he desired a full hearing on the merits, which was granted him.

Defendant's fourth contention is likewise without merit. It is not now and never has been urged, insofar as the record discloses, that plaintiff relied simply on the stipulation in the trust deed authorizing the appointment of a receiver. The record is replete with valid and substantial reasons to justify the appointment of a receiver to conserve and manage the property, which was shown to be grossly inadequate security for the indebtedness secured by the trust deed against it.

In view of the demonstrated incapacity of defendant to manage the property, and upon consideration of all of the equities herein, we fail to see any abuse of the trial court's discretion in its refusal to permit defendant to continue to manage the property upon giving bond, in lieu of the appointment of the receiver.

After a careful examination of the allegations in plaintiff's petition for the appointment of a receiver, defendant's petition to vacate the order appointing the receiver and plaintiff's answer thereto, and of defendant's evidence on the hearing on the motion to vacate the order appointing the receiver, we are in full accord with the conclusions reached by the learned chancellor in denying the motion to vacate the order appointing the receiver, when he said:

"Well, I don't see that there is much more to hear here, counsel. It is a question of whether he should be allowed to take possession under a bond. When the receiver was appointed, he was not a record title holder. He claims to have a thousand dollars equity here in a piece of property that he says is worth a hundred and fifty thousand dollars, claiming to own forty-one ninety-ninths of it. He has twenty-eight vacant apartments in it out of fifty-two, and he admits that he made the statements to the business agent of the

of the reality upon which objection to such appointment might be predicated, he waived any such right by advising the trial court that he desired a full hearing on the merits, which was granted him.

Defendant's lower court contention is likewise without merit. It is not now and never has been made, insofar as the record discloses, that plaintiff relied simply on the stipulation in the trust deed authorizing the appointment of a receiver. The record is replete with valid and substantial reasons to justify the appointment of a receiver to conserve the mortgage property, which was shown to be grossly inadequate security for the indebtedness secured by the trust deed against it.

In view of the demonstrated inadequacy of defendant to manage the property, and upon consideration of all of the equities herein, we fail to see any abuse of the trial court's discretion in its refusal to permit defendant to continue to manage the property upon giving bond, in lieu of the appointment of the receiver.

After a careful examination of the affidavits in plaintiff's petition for the appointment of a receiver, defendant's petition to vacate the order appointing the receiver and plaintiff's answer thereto, and of defendant's evidence on the hearing on the motion to vacate the order appointing the receiver, we are in full accord with the conclusions reached by the learned chancellor in denying the motion to vacate the order appointing the receiver, when he said:

"Well, I don't see that there is much more to be a fact, [illegible]. It is a question of whether he should be allowed to take possession under a bond. Then the receiver [illegible] not a good title holder. He claims to have a thousand dollars equity here in a piece of property that he says is worth [illegible] and that thousand dollars, claiming to own forty-one ninety-ninths of it. He has twenty-eight vacant apartments in it out of [illegible], and he admits that he made the statements to the business agent of the

University himself that he is not familiar with the management of that kind of property and there are some substantial defaults in the payment of principal, interest and taxes and I don't know why this order which was entered is not a proper order, and besides, you seem to have in mind that if he takes possession under a bond, he should be compensated for managing it. The statute does not contemplate that. Where he is the owner and he takes possession of a piece of property under a bond and accounts to the court, he doesn't get paid for it, for doing it. We let him do it because he is the owner and because he has a substantial equity in it rather than to incur the expense of a receivership. If somebody is going to be paid for running it, it might as well be somebody who will try to rent it and who will do it a little more successfully than Mr. Johnston has. * * * I don't see why he should have twenty-eight vacancies out of the fifty-two. I think the University has a right, under all of the circumstances, to have a receiver. One was appointed and the only point made in your petition is that you didn't have notice. Now, that part of it has been taken care of and disposed of. * * * I don't think he is a bona fide owner of the property. He comes in and by his own statement on the witness stand here, he says that he paid $10.00 and some other considerations for a half ownership in this valuable piece of property and you asked him what the other considerations were and he said something like a thousand dollars, and he says, himself, that the property is worth a hundred and fifty thousand dollars and he paid a thousand dollars for a half interest in it. * * * He has dealt with the University's business manager here during all of this time, by his own statement and by common concession here and yet he never disclosed to them that he was a part owner of the property and it was not until after the receiver was appointed that he came in here on a petition and claims to be an owner of the property. He always said he was an agent for the owner in Michigan and now he says he is an owner. That statute applies to bona fide owners. * * *"

We deem it unnecessary in the view we take of the issues presented on this appeal to consider plaintiff's motion, which was reserved to hearing, for leave to file in this court under the provisions of the Civil Practice Act, amended verifications to its petition for the appointment of a receiver and to its answer to defendant's petition to vacate the order appointing the receiver, and it will therefore be now denied.

For the reasons indicated herein the order of the Circuit court appointing the receiver is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

University himself that he is not familiar with the management of that kind of property and there are some substantial effects in the payment of principal, interest and taxes and I don't know why this order which was entered is not a proper order, and besides, you seem to have in mind that if he takes possession under a bond, he should be compelled to manage it. The statute does not contemplate that. Here he is the owner and he takes possession of a piece of property under a bond and accounts to the court, he doesn't get paid for it, for doing it. He let him do it because he is the owner and because he has a substantial equity in it rather than to incur the expense of a receivership. If somebody is going to be paid for running it, it might as well be somebody who will try to run it and who will do it a little more successfully than Mr. Johnston has. * * * I don't see why he should have twenty-eight vacancies out of the fifty-two. I think the University has a right, under all of the circumstances, to have a receiver. One was appointed and the only point made in your petition is that you didn't have notice. Now, that part of it has been taken care of and disposed of. * * I don't think he is a bona fide owner of the property. He comes in and by his own statement on the witness stand here, he says that he paid $15.00 and some other consideration for a half ownership in this valuable piece of property and you as had him with the other considerations were and he said something like a thousand dollars, and he says, himself, that the property is worth a hundred and fifty thousand dollars and he paid a thousand dollars for a half interest in it. * * * He has dealt with the University's business manager here during all of this time, by his own statement and by common consideration here and yet he never disclosed to them that he was a part owner of the property and it was not until after the receiver was appointed that he came in here on a petition and claims to be an owner of the property. He always said he was an agent for the owner in Michigan and now he says he is an owner. That statute applies to bona fide owners. * * *"

We deem it unnecessary in the view we take of the issues presented on this appeal to consider plaintiff's motion, which was reserved to hearing, for leave to file in this court under the provisions of the civil procedure act, amended writ involving to its petition for the appointment of a receiver, or to the answer to defendant's petition to vacate the order appointing the receiver, and it will therefore be not denied.

For the reasons indicated herein the order of the circuit court appointing the receiver is affirmed.

[illegible].

Grigsby and Cummins, JJ., concur.

37039

GAGE STRUCTURAL STEEL CO.,
a corporation,
Complainant and an Appellee,

v.

O'BRIEN BROTHERS CONSTRUCTION CO.,
a corporation, et al.,
Defendants.

MATERIAL SERVICE CORPORATION,
Intervening petitioner and an Appellee,

SANITARY DISTRICT OF CHICAGO,
a municipal corporation,
A defendant and Appellant.

275 I.A. 637

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted by the Sanitary District of Chicago (hereinafter called the "District") to reverse a decree of the superior court of Cook county, entered April 26, 1933, following the report of a master in chancery, in a proceeding arising under section 23 of the Mechanics' Lien Act of Illinois (Cahill's Stat. 1931, Chap. 82, p. 1802) in which decree the court ordered and adjudged in substance:

> That the Gage Structural Steel Co. (hereinafter called the "Gage Co."), and the intervening petitioner, Material Service Corporation (hereinafter called the "Service Co."), are hereby awarded first and subsisting liens "upon and against the aforesaid fund of $19,356.04," now in the hands of the District, said liens being apportioned as follows:
>
> (a) In favor of the complainant, Gage Co., the sum of $16,150.
> (b) In favor of the intervening petitioner, Service Co., the sum of $3,206.04.
>
> That the District, and its trustees and officers, within 10 days, pay or cause to be paid to the Gage Co. and the Service Co. the following respective amounts:

37Oa

DAGE STRUCTURAL STEEL CO.,
a corporation,
Complainant and an appellee,

v.

O'HARE ROOFING CONSTRUCTION CO.,
a corporation, et al.,
Defendants.

MATERIAL SERVICE CORPORATION,
Intervening petitioner and an appellee,

SANITARY DISTRICT OF CHICAGO,
a municipal corporation,
A defendant and appellant.

MR. JUSTICE CHILDRY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted by the Sanitary District of Chicago (hereinafter called the "District") to reverse a decree of the superior court of Cook County, entered April 30, 1934, following the report of a master in chancery, in a proceeding arising under section 23 of the Drainage Act of Illinois (Smith's Stat. 1931, Chap. 42, par. 16 R) in which decree the court overruled and adjudged in substance:

That the Dage Structural Steel Co. (hereinafter called the "Dage Co."), and the intervening petitioner, Material Service Corporation (hereinafter called the "Service Co."), are hereby awarded first and subsisting liens upon and against the aforesaid fund of $18,386.04, now in the hands of the District, said liens being apportioned as follows:

(a) In favor of the complainant, Dage Co., the sum of $15,186.
(b) In favor of the intervening petitioner, Service Co., the sum of $3,200.04.

That the District, and its trustees and officers, within 10 days, pay or cause to be paid to the Dage Co. and the Service Co., the [illegible]

(a) To the Gage Co. the sum of $16,150, together with its taxed costs including the sum of $274.35 for Master's fees and charges;

(b) To the Service Co. the sum of $3206.04, together with its taxed costs including the sum of $100 for Master's fees and charges.

That the court hereby reserves jurisdiction of the cause for the purpose of compelling obedience by the District, and by its trustees and officers, to the directions of this decree.

That the O'Brien Brothers Construction Co., (hereinafter called the O'Brien Co.) and the Foreman-State National Bank, and their respective agents and attorneys, are hereby perpetually enjoined from making or asserting any claim or demand against the District, arising or growing out of the subject matter involved in this cause.

And in the decree the court, after making recitals and approving and confirming the master's report, made findings as follows:

1. That the equities are with the complainant, Gage Co., and the intervening petitioner, Service Co.; and that the material averments of the bill of the Gage Co. and of the intervening petition of the Service Co. have been proven and are true.

2. That on June 7, 1928, the District, being about to construct certain bridges over its north shore channel, entered into a written agreement with the O'Brien Co., wherein the latter agreed to furnish all labor and material for the work, and said District agreed to pay to it the following amounts:

For all work in place, included under Division A as specified and shown on the plans, the lump sum price of $244,673.50.
For all work in place, included under Division B as specified and shown on the plans, the lump sum price of $182,250.
For all work in place, included under Division C as specified and shown on the plans, the lump sum price of $171,769.
For all work in place, included under Division D as specified and shown on the plans, the lump sum price of $146.453.

3. That on or about August 21, 1928, the O'Brien Co. entered into a written contract with complainant, Gage Co., whereby complainant agreed to furnish and install the structural steel work required in the erection of said bridges, as per plans and specifications furnished to the O'Brien Co. by said District, and to furnish labor and materials therefor, and the O'Brien Co. therein agreed to pay to complainant for said work upon the following unit prices, to-wit:
For the structural steel furnished the price of $67.40 per ton;
For steel castings the price of $176 per ton; and
For the labor of erection the price of $26 per ton.

4. That pursuant to said sub-contract complainant furnished the required materials and labor and fully complied with the terms of the sub-contract; that in connection with its performance, the O'Brien Co. directed complainant to provide various

(a) To the Dogg Co. the sum of [illegible], together with its taxed costs including the sum of $274.15 for master's fees and charges;

(b) To the Service Co. the sum of [illegible], together with its taxed costs including the sum of [illegible] for master's fees and charges.

That the court hereby reserves jurisdiction of the cause for the purpose of adjudicating the issues by the Judicial and by its trustees and officers, to the directions of this decree.

That the 'Dylan Brothers Construction Co.' (hereinafter called the 'Dylan Co.') and the corporate-trustee National Bank, and their respective agents and attorney, are hereby perpetually enjoined from making, or attempting to make or cause to be made, claims, suing or proceeding out of the subject matter involved in this cause.

And in the course the court after hearing [illegible] and approving and confirming the materials report, [illegible] as follows:

1. That the entities [illegible] in the [illegible] Co., and the intervening petitioner, [illegible] and that the material agreements of the mill of the Dogg Co. and of the intervening petition of the Service Co. were been proven and are true.

2. That on June 7, 1928, the parties, being about to construct certain bridges over the [illegible] River, entered into a written agreement with the 'Dylan Co.' wherein the latter agreed to furnish all labor and material for the work, and said district agreed to pay to it the following amounts:

For all work in place, including under division A as specified and shown on the plans, the lump sum price of $[illegible].00.
For all work in place, including under division B as specified and shown on the plans, the lump sum price of $[illegible].00.
For all work in place, including under division C as specified and shown on the plans, the lump sum price of $[illegible].00.
For all work in place, including under division D as specified and shown on the plans, the lump sum price of $[illegible].00.

3. That on or about August 11, 1928, the 'Dylan Co.' entered into a written contract with complainant, the Co., wherein complainant agreed to furnish and install, the structural steel work required in the erection of said bridges, as per plans and specifications furnished to the 'Dylan Co.' by said district, and to furnish labor and materials therefor, and the 'Dylan Co.' thereon agreed to pay to complainant for said work upon the following unit prices, to-wit:

For the structural steel furnished the price of $[illegible] per ton,
For steel erecting the price of $[illegible] per ton and
For the labor of erection the price of $[illegible] per ton.

4. That pursuant to said sub-contract complainant furnished the required materials and labor and fully complied with the terms of the sub-contract; that in connection with its performance, the 'Dylan Co.' directed and induced to provide various

items of extra and additional work, which were likewise fully performed by complainant; that complainant's last work was done on, to-wit, March 31, 1930; and that all of said work, both contract and extra work, was "fully approved and accepted" by the O'Brien Co. and by the District.

5. That the quantities of materials furnished and provided by complainant upon each of the bridges, together with the amounts payable to complainant therefor, based upon said unit prices established by complainant's sub-contract with the O'Brien Co., are as follows: (Here is set forth a schedule as to the four bridges, viz., at Devon avenue, Touhy avenue, Dempster street and Church street, giving the itemized amounts for the structural steel and the steel castings and the cost of the erection thereof for each bridge under said sub-contract, and the total costs thereof.)

6. That the fair and reasonable value of the various items of "extra and additional work," so furnished by complainant at the request of the O'Brien Co., "is the sum of $9,642.85," which said sum is still due to complainant.

7. That by agreement between complainant and the O'Brien Co., a credit of $500 was allowed to the O'Brien Co., for field work on all of the bridges; and that, therefore, after allowing all just credits, there is still due to complainant from the O'Brien Co., "a balance of $31,643.78," under said sub-contract and by reason of said extra and additional items, together with interest thereon at 5 per cent. from March 31, 1930.

8. That on June 9, 1931, complainant caused to be served upon the District, "four notices of sub-contractor's mechanics' lien, each in due form of law, claiming liens for the amounts due to complainant upon the <u>moneys, bonds and warrants</u> in the hands of the Sanitary District, due or which were to become due to said O'Brien Co."

9. That at the date of the service of said four notices of lien "the sum of $19,356.04, <u>remained in the hands</u> of the Sanitary District, due to said O'Brien Co., the contractor, said amount being the balance due to said contractor under its general contract with said District."

10. That on October 20, 1929, the O'Brien Co. entered into an oral agreement with the Service Co. by which the latter was to furnish the sand, stone, concrete, etc. to be used in the erection of the bridges and its approaches; that the O'Brien Co. agreed to pay to the Service Co. $2.60 per cubic yard for gravel and torpedo sand, and $2.40 per barrel for cement; that the Service Co. delivered sand, gravel and cement on said job under its said agreement with the O'Brien Co.; that the total of the materials so furnished by the Service Co. to said job amounted to $33,078.31, and it has been paid on account thereof the sum of $26,732.35, "leaving a balance of approximately $6,300 due to it from the O'Brien Co. under said oral agreement;" that said materials were furnished on January 31, 1931; and that on June 30, 1931, the Service Co. caused a notice of its mechanic's lien, in due legal form, to be served on said District.

11. That at the times of service of said notices of claims for lien by complainant and the Service Co., "no voucher or other evidences of indebtedness had been issued and/or delivered to the O'Brien Co. by or on behalf of the Sanitary District."

items of extra and additional work, which were likewise fully performed by complainant; that complainant's last work was done on, to-wit, March 31, 1928; and that all of said work, both contract and extra work, was "fully approved and accepted" by the O'Brien Co. and by the district.

5. That the quantities of materials furnished and provided by complainant upon each of the bridges, together with the amounts payable to complainant therefor, based upon said unit prices established by complainant's sub-contract with the O'Brien Co., are as follows: (Here is set forth a schedule as to the four bridges, viz., at Seven Avenue, Tenby avenue, Lompoctor street and Clinton street, giving the itemized amounts for the extensional steel and the steel castings and the cost of the erection thereof for each bridge under said sub-contract, and the total costs thereof.)

6. That the fair and reasonable value of the various items of "extra and additional work," so furnished by complainant at the request of the O'Brien Co., in the sum of "$42,[illegible]," which said sum is still due to complainant.

7. That by agreement between complainant and the O'Brien Co., a credit of $[illegible] was allowed to the O'Brien Co., for field work on all of the bridges; and that, therefore, after allowing all just credits, there is still due to complainant from the O'Brien Co., "a balance of $31,[illegible]," under said sub-contract and by reason of said extra and additional items, together with interest thereon at 6 per cent, from March 31, 1929.

8. That on June 9, 1931, one Lamont caused to be served upon the district, "four notices of sub-contractor's mechanics' lien, each in due form of law, claiming liens for the amounts due to complainant upon the vouchers, bonds and warrants in the hands of the sanitary district, due or which were to become due to said O'Brien Co."

9. That at the date of the service of said four notices of lien "the sum of $[illegible], remained in the hands of the sanitary district, due to said O'Brien Co., the contractor, said amount being the balance due to said contractor under its general contract with said district."

10. That on October 2, 1928, the O'Brien Co. entered into an oral agreement with the Service Co. by which the latter was to furnish the sand, stone, concrete, etc. to be used in the erection of the bridges and its appurtenances; that the O'Brien Co. agreed to pay to the Service Co. $[illegible] per cubic yard for gravel and torpedo sand, and $[illegible] per barrel for cement; that the Service Co. delivered sand, gravel and cement on said jobs under its said agreement with the O'Brien Co.; that the total of the materials so furnished and delivered by the Service Co. to said jobs amounted to $[illegible], and it has been paid on account thereof the sum of $[illegible], leaving a balance of approximately $[illegible] due to it from the O'Brien Co. under said oral agreement; that said materials were furnished on January 31, 1931; and that on June 9, 1931, the Service Co. caused a notice of its mechanic's lien, in due legal form, to be served on said district.

11. That at the times of service of said notices of claims for lien by complainant and the Service Co., "no vouchers or other evidences of indebtedness had been issued and/or delivered to the O'Brien Co. by or on behalf of the sanitary district."

12. That the complainant, Gage Co., and the defendant, Service Co., "are each entitled to mechanic's liens under Section 23 of the Mechanics' Lien Law of this State, upon the said moneys, amounting to $19,356.04, so heretofore found to be in the hands of the Sanitary District, due and unpaid to the O'Brien Co., said liens to be maintained, as between themselves, in proportion to the amounts so found to be due complainant and the Service Co., respectively."

13. That the fees and charges of the master, in the sum of $374.35 are reasonable and proper, and said sum is hereby fixed as the master's fees, and ordered taxed herein as part of the costs against the District - in favor of complainant in the sum of $274.35, and in favor of the Service Co. in the sum of $100.

14. That neither of the defendants, the O'Brien Co. nor the Foreman-State National Bank, have any right, title or interest in or to said fund of $19,356.04, nor any other rights or claim against the District, arising or growing out of the subject matter of this suit.

In complainant's bill, filed September 24, 1931, after making various allegations as to the execution of said written contracts, its completion of certain described work on said bridges, and its service of notices for claims for liens, etc., it prayed that "an accounting might be taken of the moneys, bonds and warrants which, on June 9, 1931, remained in the hands of the District, due or to become due to the O'Brien Co.;" that complainant "might be decreed to have and maintain a valid and subsisting mechanic's lien against and upon all of said moneys, bonds and warrants for the amount ascertained to be due to it;" that the District "might be decreed to pay to complainant said moneys, bonds and warrants to satisfy and discharge its said lien;" and that in default of the payment of the amounts of said decree, "complainant's lien upon said funds might be enforced by a personal money decree against said Sanitary District," etc.

On November 19, 1931, the District filed its answer to the bill, in which, after admitting certain allegations and denying others, it specifically made the following admission:

"That the O'Brien Co. has completed the said public improvements for the defendant, Sanitary District; that the contract price for said improvements was $741,301.30; that the Sanitary District now has in its hands and admits it is indebted to said O'Brien Co., for and on account of said public improvements a sum of money; and that said sum of money so retained by it is $19,356.04."

12. That the complainant, Gage Co., and the defendant, Service Co., "are each entitled to mechanic's liens under section 25 of the Mechanics' Lien law of this state, upon the said moneys, amounting to $19,388.04, so her before found to be in the hands of the Sanitary District, due and unpaid to the O'Brien Co., said liens to be maintained, as between themselves, in proportion to the amounts so found to be due complainant and the Service Co., respectively."

13. That the fees and charges of the master, in the sum of $274.38 are reasonable and proper, and said sum is hereby fixed as the master's fees, and orderd taxed herein as part of the costs against the District - in favor of complainant in the sum of $274.38, and in favor of the Service Co. in the sum of $100.

14. That neither of the defendants, the O'Brien Co. nor the Foremen-State National Bank, have any right, title or interest in or to said fund of $19,388.04, nor any other rights or claim against the District, making or prosecuting out of the subject matter of this suit.

In complainant's bill, filed September 26, 1921, after making various allegations as to the execution of said written contracts, its completion of certain described work on said bridges, and its service of notices for claims for liens, etc., it prayed that "an accounting might be taken of the moneys, bonds and warrants which, on June 9, 1921, remained in the hands of the District, due or to become due to the O'Brien Co.;" that complainant might be decreed to have and maintain a valid and subsisting mechanic's lien against and upon all of said moneys, bonds and warrants for the amount ascertained to be due to him; that the District might be decreed to pay to complainant said moneys, bonds and warrants to a third and discharge its said lien;" and that in default of the payment of the amount of said lien, "complainant's lien upon said funds might be enforced by a personal money decree against said Sanitary District," etc.

On November 19, 1921, the District filed its answer to the bill, in which, after admitting certain allegations and denying others, it specifically made the following admissions:

"That the O'Brien Co. has completed the said public improvements for the defendant, Sanitary District; that the contract price for said improvements was $21,333.30; that the Sanitary District now has in its hands and admits it is indebted to said O'Brien Co., for and on account of said public improvements a sum of money; and that said sum of money on reckoning by it is $19,388.04."

On November 28, 1931, service having been had on the O'Brien Co., it was defaulted for want of an appearance or answer, and complainant's bill was ordered to be taken as confessed as to it. On the same day, replications having been filed by complainant to the answers of the District and the Foreman-State National Bank (assignee of the rights of the O'Brien Co.), the cause was referred to a master to take proofs and report the same, together with his conclusions of law and fact. On the same day leave was given to the Service Co. to file its answer to the bill, in the nature of an intervening petition, at a future date, but without prejudice to said reference. On December 9, 1931, such answer or intervening petition was filed by the Service Co., in which, after setting forth the execution of the written contract between the Sanitary District and the O'Brien Co. of June 7, 1928, it made allegations relative to its claim substantially as found by the court to be the facts in paragraphs 10 and 11 of the decree as above mentioned.

After considerable testimony had been taken before the master and shortly before the expiration of a rule entered by the master upon the District to close its proofs, its counsel made an oral motion before the master for a continuance or suspension of the hearing in order "to permit the Sanitary District to file an independent bill in equity to correct several mistakes made in its contract with the O'Brien Co. of June 7, 1928." The motion was opposed by complainant's counsel and denied by the master. In making the motion counsel for the Sanitary District stated in part:

"The District does not feel that the present proceeding in mechanic's lien is broad enough to afford the proper relief, and is asking that the proceedings now in progress be stayed so as to give the court an opportunity to go into all the issues in the case in an independent suit. In this proposed bill we expect to ask that the present proceedings be enjoined, and that the O'Brien Co. and the U. S. A. Company, with which the Sanitary District had another contract, may be made defendants in the independent suit, so that they can all come in and answer and the whole matter may be adjudicated in that suit."

It does not appear from the present record that at any

On November 20, 1933, service having been had on the O'Brien Co., it was defaulted for want of an appearance or answer, and complainant's bill was ordered to be taken as confessed as to it. On the same day, replications having been filed by complainant to the answers of the District and the Government-Texas National Bank (assignee of the rights of the O'Brien Co.), the cause was referred to a master to take proofs and report the same, together with his conclusions of law and fact. On the same day leave was given to the service Co. to file its answer to the bill, in the nature of an intervening petition, at a future date, but without prejudice to such interference. On December 2, 1933, such answer or intervening petition was filed by the service Co., in a lot, after setting forth the execution of the written contract between the Texas by District and the O'Brien Co. of June 7, 1933, it made allegations relative to its claim substantially as found by the court to be the facts in paragraphs 10 and 11 of the decree as above mentioned.

After considerable testimony has been taken before the master and shortly before the expiration of a rule entered by the master upon the District to close its proof, it counsel made an oral motion before the master for a continuance or suspension of the hearing in order "to permit the district by District to file an independent bill in equity to correct several mistakes made in its contract with the O'Brien Co. of June 7, 1933." The motion was opposed by complainant's counsel and denied by the master. In making the motion counsel for the District by District stated in part:

"The District does not feel that the present proceeding in mandamus's like as broad enough to allow the proper relief, and is sorry that the proceeding was in progress be stayed so as to give the court an opportunity to go into all the issues in the case in an independent suit. In this proposed bill we expect to ask that the present prayer stands be original, and that the O'Brien Co. and the U. S. Government, with which the District District had another contract, may be made defendants in the independent suit, so that they can all come in and answer and the whole matter may be adjudicated in that suit."

It does not appear from the present record that any

time thereafter the District filed any such independent suit, or that any injunction was issued, or that in the present cause the District filed a cross-bill asking for any affirmative relief regarding any proposed reformation of said contract. The U. S. A. Company was not a party defendant in the present cause.

On September 24, 1932, the District made a motion before the chancellor, for leave to file an amended answer to complainant's bill. The motion was supported by two affidavits and, after arguments had, an order was entered allowing such answer to be filed, but "without prejudice to the reference to the master and to all evidence taken and proceedings had therein." And it was specifically provided in the order "that the filing of said amended answer shall not operate to relieve said defendant from the effect of the admissions of fact contained in its original answer, but the determination of the effect of such admissions is hereby expressly reserved to the final hearing of the cause."

In said amended answer the District admitted that it had entered into said contract of June 7, 1928, for the construction by the O'Brien Co. of said four bridges. It alleged that by the contract the O'Brien Co. agreed to do all of the required work "free from all claims, liens and charges whatsoever," and that because of this provision the District "should not be held liable for any claims, demands or liens of complainant as set forth in its bill of complaint." It denied that the O'Brien Co. had completed the work for the District in accordance with the terms of the contract, and alleged that "there is nothing due or owing to the O'Brien Co." It did not specifically deny that at the time of the service of the claims for liens of complainant and the Service Co. against the funds in its hands due to the O'Brien Co., said funds amounted to $19,356.04.

During the hearing before the master counsel for the District made certain offers to prove that a "mistake" had been

time thereafter the district filed any such independent suit, or that any injunction was issued, or that in the present cause the district filed a cross-bill seeking for any affirmative relief regarding any proposed reformation of said contract. The U. S. A. Company was not a party defendant in the present cause.

On September 22, 1922, the district made a motion before the chancellor, for leave to file an amended answer to complainant's bill. The motion was supported by two affidavits and, after argument had, an order was entered allowing such answer to be filed, but "without prejudice to the reference to the master and to all evidence taken and proceedings had therein." And it was specifically provided in the order "that the filing of said amended answer shall not operate to relieve said defendant from the effect of the admissions of fact contained in its original answer, but the determination of the effect of such admissions in bar" appropriately reserved to the final hearing of the cause."

In said amended answer the district admitted that it had entered into said contract of June 7, 1920, for the construction by the O'Brien Co. of said four bridges. It alleged that by the contract the O'Brien Co. agreed to do all of the required work "free from all claims, liens and charges whatsoever," and that because of this provision the district should not be held liable for any claims, demands or liens of complainant as set forth in the bill of complaint." It denied that the O'Brien Co. had completed the work for the district in accordance with the terms of the contract, and alleged that "there is nothing due or owing to the O'Brien Co." It did not specifically deny that at the time of the service of the claims for liens of complainant and the O'Brien Co. against the funds in its hands due to the O'Brien Co., said funds amounted to $19,886.04.

During the hearing before the master counsel for the district made certain offers to prove that a "mistake" had been

made in the contract of June 7, 1928, between the District and the O'Brien Co., in that certain paving work, of the reasonable value of $18,261.05, should have been omitted from the contract because it had already been embraced in a prior contract of October 27, 1927, between the District and said U. S. A. Company, and that while it appeared the O'Brien Co. actually had done said paving work it had done it as a sub-contractor of the U. S. A. Company and not under said contract of June 7, 1928. The master refused to allow the offers of proof (which ruling was afterward sustained by the court). One of the contentions here made by counsel for the District is that the sustaining of said rulings of the master constituted prejudicial error. Considering the entire evidence, including various "estimate vouchers" issued by the District, and particularly those vouchers, Nos. 15 and 16, issued by it respectively on December 10th and 11th, 1930, we find no substantial merit in the contention.

Counsel for the District also contend, inasmuch as the District was allowed to file its amended answer (though under the specific provisions above mentioned) that the court erred in considering the admissions of the District as contained in its original answer (wherein it admitted that, of the contract price of $741,301.30, it had in its possession undisbursed and owing to the O'Brien Co. the sum of $19,356.04.) In our opinion this contention is also without merit. We think that the court could properly consider the admissions as contained in the original answer in connection with other evidence introduced by complainant, which disclosed that said sum still remained in the District's hands undisbursed and owing to the O'Brien Co. (See Maher v. Bulla Adm'x, 39 Ill. 536, 537; Blakeslee v. Blakeslee, 265 Ill. 48, 52; People's Bank v. Wood, 207 Ill. App. 602, 604.)

Equally without merit in our opinion is counsels' further contention that "the court erred in allowing a mechanics' lien,

made in the contract of June 7, 1926, covering the district and the O'Brien Co., in such materials having worn, or the reasonable value of $8,861.05, amounts have been omitted from the contract because it had already been embarked in a joint contract of October 27, 1927, between the district and with [illegible], and that while it opposes the O'Brien Co. actually [illegible] paving work it had done [illegible] a sub-contractor [illegible] under said contract of June 7, 1926. [illegible] the offers of proof, which [illegible] court). One of the contentions here made by counsel for the district is that the awarding of such relief [illegible] prejudicial error. Considering the entire record, including various "estimate vouchers" issued by the district, and particularly those vouchers, Nos. 15 and 16, issued by it respectively on October 10th and 11th, 1927, we find no substantial merit in the contention.

Counsel for the district also contends, inasmuch as the district was allowed to file its counter-answer, through which the specific provisions above mentioned, that the court erred in overruling the objections of the district to consideration in its original answer (wherein it admitted that, [illegible] of [illegible]), it had in its possession unauthorized and owing to the O'Brien Co. the sum of $8,861.05. In our opinion this contention is also without merit. We think that the joint court properly consider the admissions as contained in the original answer in connection with other evidence introduced in complainant, which disclosed that said sum still remains in the district's hands unauthorized and owing to the O'Brien Co. (See Baker v. Pulliam, 48 Ill. App. 326, 327; Stanfield v. Hinrichs, 90 Ill. 49; People's Bank v. Cook, 207 Ill. App. 404, 406.)

Finally without merit in our opinion is counsel's further contention that "the court erred in allowing a mechanics' lien,

where the contract provided that the contractor (O'Brien Co.) at its proper cost and expense do all the work and furnish all materials, etc., free from all claims, liens and charges whatsoever." This is a proceeding under section 23 of the Mechanics' Lien Act by sub-contractors under the O'Brien Co., to recover the balance of the moneys in the hands of the District, due and owing to the O'Brien Co., the original contractor, for work done for the municipality, and such claim of waiver of lien has no proper application. (See Central Lime & Cement Co. v. Leyden-Ortseifen Co., 245 Ill. App. 48, 51-3; West Chicago Park Commissioners v. Western Granite Co., 200 Ill. 527, 531-3; North Side Sash Co. v. Goldstein, 286 Ill. 209, 211-12.) Furthermore, the right to a lien of the sub-contractor (complainant) on the funds in the hands of the municipality for work done and materials furnished, by virtue of the provisions of said section 23, shouldnot be allowed to be impaired by any agreement between the municipality and the O'Brien Co. (See County of Coles v. Haynes & Lyons, 134 Ill. App. 320, 324-5, affirmed in 234 Ill. 137; Continental Portland Cement Co. v. City of Eldorado, 206 Ill. App. 387, 392-3; Huebner v. Kornaizer, 259 Ill. App. 540, 542.)

Counsel for the District further contend that error was committed in not allowing the District to show certain claimed omissions in the work and in not deducting the claimed value of such omissions, as provided for in Article 5 and 7 of the contract between the District and the O'Brien Co. A sufficient answer to this contention, in our opinion, is that it appears from said "Estimate Vouchers," Nos. 15 and 16, issued by the District and introduced in evidence by complainant, deductions were made for claimed omitted work in reaching said balance admitted to be due to the O'Brien Co. of $19,356.04. Furthermore, an examination of the record convinces us that full opportunity was given on the hearing to the District to prove any claims for deductions, etc.,

where the contract provided that the contractor ("Brian Co.) at its proper cost and expense do all the work and furnish all materials, etc., free from all claims, liens and encumbrances whatsoever." This is a proceeding under section 18 of the mechanics' lien act by sub-contractors under the "Brian Co., to recover the balance of the money in the hands of the district, due and owing to the "Brian Co., the original contractor, for work done for the municipality, and such claim of waives if lien has no proper application. (see Central Line & Cement Co. v. Lydon-Stanbury Co., 245 Ill. 4r. 68, 91-92; Best Wiener Work Contractors v. Eastern Granite Co., 290 Ill. 6r. 7, 93-8; North Side Bank Co. v. Goldstein, 288 Ill. 209, 211-12.) Furthermore, the right to a lien of the sub-contractor (complainant) on the funds in the hands of the municipality for work done and materials furnished, by virtue of the provisions of this section 18, cannot be allowed to be impaired by any agreement between the municipality and the "Brian Co. (see County of Solano v. Kennel & Lyons, 1 N. Ill. App. 280, 284-5, affirmed in 204 Ill. 1r7; Continental Portland Cement Co. v. City of Alexander, 208 Ill. 4r. 387, 392-3; Malmer v. Kornmeier, 250 Ill. App. 360, 362.)

Counsel for the defendant Fredson contend that error was committed in not allowing the defendant to enter certain claimed omissions in the work and in not deducting the claimed value of such omissions, as provided for in article [illegible] of the contract between the defendant and the "Brian Co. [illegible] sufficient answer to this contention, in our opinion, is the [illegible] from said "Estimate Voucher," Nos. I, II and IV, issued by the defendant and introduced in evidence by complainant, no mention was made for claimed omitted work in reducing said balance [illegible] to be due to the O'Brian Co. of $19,388.04. Furthermore, in one [illegible] of the record evidence is that full opportunity was given on the hearing to the defendant to prove any claims for deductions, etc.,

by proper evidence, which it failed to do.

Other minor contentions are made by counsel for the District as grounds for a reduction in the amounts decreed to be paid by the District. We find no merit in any of these contentions.

A cross-error has been assigned on the record by complainant, the Gage Co. It presents the question as to whether or not the decree should be modified and enlarged so as to include the $9,642.85, claimed by the Gage Co. as due for extra work, etc., in addition to the $19,356.04, found to be due from the District to the O'Brien Co. under the original contract, and which latter sum the District was decreed to pay, - viz., $16,150 to the Gage Co. and $3,206.04 to the Service Co. After considering the evidence and certain provisions in the original contract between the District and the O'Brien Co., we do not think that any modification of the decree should be made. Under the provisions of section 23 of the Mechanics' Lien Act such additional amount for extra work might properly be allowed to complainant <u>if</u> it sufficiently appeared that the provisions of said <u>original</u> contract as to allowance for extra work had been complied with. Those provisions are contained in Article 6 of that contract and are in substance that "the Contractor (O'Brien Co.) shall perform such extra work as the Engineer (of the District) may direct in his written order," but that no extra work in excess of $500 shall be performed by said contractor <u>until</u> said Engineer is authorized by the Board of Trustees of the District to issue such a written order, and the same shall have been issued; that all claims for extra work furnished by the contractor "must be reported to the Engineer in writing" when such work is furnished and within a stated time; and that "the written order of the Engineer to the Contractor to perform any extra work therein mentioned, and the written notices and statements of the work * * required from said Contractor, are <u>conditions precedent</u> to any

by proper evidence, which it failed to do.

Other minor contentions are made by counsel for the District as grounds for a reduction in the amounts decreed to be paid by the District. We find no merit in any of these contentions.

A cross-error has been assigned on the record by complainant, the Sage Co. It presents the question as to whether or not the decree should be modified and enlarged so as to include the $9,642.88, claimed by the Sage Co. as due for extra work, etc., in addition to the $19,356.04, found to be due from the District to the O'Brien Co. under the original contract, and which latter sum the District was decreed to pay, - viz., $16,189 to the Sage Co. and $3,306.04 to the Service Co. After considering the evidence and certain provisions in the original contract between the District and the O'Brien Co., we do not think that any modification of the decree should be made. Under the provisions of section 85 of the Mechanics' Lien Act such additional amount for extra work might properly be allowed to complainant if it sufficiently appeared that the provisions of said original contract as to allowance for extra work had been complied with. These provisions are contained in Article 5 of that contract and are in substance that the Contractor (O'Brien Co.) shall perform such extra work as the Engineer (of the District) may direct in his written order," but that no extra work in excess of $300 shall be performed by said contractor until said Engineer is authorized by the Board of Trustees of the District to issue such a written order, and the same shall have been issued; that all claims for extra work furnished by the contractor "must be reported to the Engineer in writing" when such work is furnished and within a stated time; and that "the written order of the Engineer to the Contractor to perform any extra work therein mentioned, and the written notices and statements of the work " required from said Contractor, are conditions precedent to any

recovery on the part of said contractor for any extra work performed." We do not think that complainant's evidence (introduced to show that the contractor, O'Brien Co., had additional sums coming to it from the District for extras beyond the sum of $19,356.04), sufficiently shows that as to said additional sums the above provisions of the original contract were complied with. In other words it does not sufficiently appear that there are any moneys (in excess of said sum of $19,356.04) properly due from the District to the O'Brien Co. for extra work, when the specific conditions of the original contract as to allowances for extra work are considered and applied.

Our conclusion is that the decree of the superior court of April 26, 1933, appealed from, should be affirmed, and it is so ordered.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

recovery on the part of said contractor for any extra work performed." We do not think that complainant's evidence (introduced to show that the contractor, "Brown Co., had additional sums coming to it from the District for extras beyond the sum of $12,386.04), sufficiently shows that the said additional sums the above provisions of the original contract were complied with.

In other words it does not sufficiently appear that there are any moneys (in excess of said sum of $12,386.04) properly due from the District to the "Brown Co. for extra work, when the specific conditions of the original contract as to allowances for extra work are considered and applied.

Our conclusion is that the decree of the superior court of April 26, 1922, appealed from, should be affirmed, and it is so ordered.

AMES, J.

Melvin, J., J., and Bonham, J., concur.

37066

MATTHEW M. HOFFMAN, sheriff and successors in office, for use of Isabel W. Knott, Plaintiff in Error,	ERROR TO CIRCUIT COURT, COOK COUNTY.
v.	
MARYLAND CASUALTY COMPANY, a corporation, Defendant in Error.	275 I.A. 637[3]

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of debt on a replevin bond there was a trial without a jury on February 11, 1932, resulting in the court finding the issues for plaintiff and assessing damages at the sum of $350. After overruling defendant's motion for a new trial, the court entered judgment on the finding against defendant for debt, $6,000; damages $350; the debt to be discharged upon payment of the damages, interests and costs. From the judgment each party prayed and was allowed an appeal, but neither appeal was perfected in this court. On September 9, 1933, plaintiff, dissatisfied as to the amount of the damages awarded, sued out the present writ of error, and subsequently defendant assigned upon the record certain cross-errors.

The following facts in substance appear: On May 5, 1926, Isabel W. Knott was the owner of a building at 604 W. Lake street, Chicago, and Boyle Bros., Inc., a corporation, was her tenant of certain space in the building, and was there in possession of certain goods and chattels on which it had previously given chattel mortgages to secure the balance due on the purchase price to the Miller Saw-Trimmer Co., a corporation, (hereinafter called the Miller Co.) and

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Leslie H. Miller, Sheriff, and successors in office, for use of Isabel E. Amott,
Plaintiff in Error,

v.

MARYLAND CASUALTY COMPANY, a corporation,
Defendant in Error.

APPEAL TO CIRCUIT COURT,

COOK COUNTY.

2 T 5 I.A. 637

MR. JUSTICE DUFFY DELIVERED THE OPINION OF THE COURT:

In an action of debt on a replevin bond there was a trial without a jury on February 11, 1922, in which in the court trading the issues for plaintiff [illegible] the sum of $330. After overruling defendant's motion for a new trial, the court entered judgment on the finding, [illegible] for $6,000 damages $330; the debt to be discharged upon payment of the damages, interests and costs. From the judgment both party prayed and was allowed an appeal, but a writ of error was prosecuted in this court. On September 6, 1920, Plaintiff, dissatisfied as to the amount of the damages awarded, and on the present writ of error, and subsequently [illegible] assigned upon the record certain errors.

The following facts in substance appear: On May 5, 1916, Isabel E. Amott was the owner of a building at 606 [illegible] Lake street, Chicago, and Doyle Bros., Inc., a corporation, was her tenant of certain space in the building, and was there in possession of certain goods and chattels on which it had previously given chattel mortgages to secure the balance due on the purchase price to the Miller Summer Trimmer Co., a corporation, (hereinafter called the Miller Co.) and

which mortgages were subject only to Mrs. Knott's lien for accrued rent. On that day she caused a distress warrant to be issued and levied on the goods "for the sum of $310.50, rent past due for the months of February, March, April and May, 1926, and the further sum of $880, rent for the months of June, 1926, to April, 1927, inclusive."

On May 11, 1926, the Miller Co. commenced a replevin suit in the circuit court of Cook county and caused the goods to be taken under the writ (they then being held by virtue of the distress warrant) and to be turned over to it as holder of the mortgages. In the replevin bond, for the sum of $6,000, in usual form, it is provided that if the Miller Co. "shall prosecute its suit with effect and without delay and make return of said property, if return thereof shall be awarded, and save and keep harmless the sheriff in replevying said property and delivering it to the plaintiff by virtue of the writ, and pay all costs and damages occasioned by the wrongful suing out of said writ of replevin, then this obligation to be void, otherwise to remain in full force and effect." In the declaration in the replevin suit, filed June 11, 1926, the Miller Co. alleged in substance that the defendants named, including Mrs. Knott, had unlawfully taken the goods "of the value of $3,000," and until May 11th had unlawfully detained them. In the declaration there was also a count in trover. To the declaration Mrs. Knott filed pleas of non cepit, non detinet, property in her, and not guilty as to the trover count. To the plea of property in Mrs. Knott the Miller Co. filed a replication.

On October 10, 1927, the replevin suit was tried in the circuit court without a jury, at which time evidence was introduced by each party. The court found that the right to the possession of the property was in Mrs. Knott, and on the finding adjudged that she recover from the plaintiff the possession of the property and that a

which mortgages were subject only to Mrs. Knott's lien for accrued rent. On that day she caused a distress warrant to be issued and levied on the goods "for the sum of $310.50, rent past due for the months of February, March, April and May, 1926, and the further sum of $300, rent for the months of June, 1926, to April, 1927, inclusive."

On May 12, 1926, the Miller Co. commenced a replevin suit in the circuit court of Cook County and caused the goods to be taken under the writ (they then being held by virtue of the distress warrant) and to be turned over to it as holder of the mortgages. In the replevin bond, for the sum of $6,000, in usual form, it is provided that if the Miller Co. "shall prosecute its suit with effect and without delay and make return of said property, if return thereof shall be awarded, and save and keep harmless the sheriff in replevying said property and delivering it to the plaintiff by virtue of the writ, and pay all costs and damages occasioned by the wrongful suing out of said writ of replevin, then this obligation to be void, otherwise to remain in full force and effect." In the declaration in the replevin suit, filed June 12, 1926, the Miller Co. alleged in substance that the automobile named, including one, Knott, had unlawfully taken the goods "of the value of $6,000," and until May 11th had unlawfully detained them. In the defendant's plea was also a count in trover. To the declaration Mrs. Knott filed pleas of non cepit, non detinet, property in her, and not guilty as to the trover count. To the plea of property in Mrs. Knott the Miller Co. filed a replication.

On October 10, 1927, the replevin suit was tried in the circuit court without a jury, at which time evidence was introduced by each party. The court found that the right to the possession of the property was in Mrs. Knott, and on the finding judgment that she recover from the plaintiff the possession of the property and that c

writ of <u>retorno habendo</u> issue. In the meantime, prior to the trial, the Miller Co. had caused the chattel mortgages to be foreclosed on the property which it had received into its possession by virtue of the replevin writ, and the property subsequently was sold at the foreclosure sale, and when the writ of <u>retorno habendo</u> was served on the Miller Co. it did not turn over the property, and the writ was returned unexecuted. It does not appear that any attempt was made by the Miller Co., by appeal or writ of error, to reverse the judgment in the replevin suit.

On November 10, 1927, the present action was commenced against the Maryland Casualty Co., the surety on the replevin bond. In the declaration, consisting of a special count, after setting out the execution of the bond by the Miller Co. as principal and defendant as surety, and also its condition (as above stated), plaintiff alleged in substance that on the trial of the replevin suit there was a finding and judgment in favor of Mrs. Knott, that although a writ of <u>retorno habendo</u> was issued and served, the Miller Co. had failed and refused to return the property, and that thereby "an action has accrued to plaintiff to demand of defendant, for the use aforesaid, the sum of $6,000 above named, yet defendant, though requested, has not paid to plaintiff said sum of money above demanded, or any part thereof, but refuses so to do: To the damage of plaintiff, for use, etc., of $6,000, etc." No items of special damages are alleged in the declaration, but in the accompanying affidavit of Henry A. Knott, "the duly authorized agent of plaintiff," it is stated:

"That the amount of money due to plaintiff, for the use aforesaid, is $6,000, and interest from the date of replevin; that this sum is made up of two items, viz., the reasonable and fair cash value of the goods at the time of replevin, being $5,000, and the reasonable attorney's fees for defending and bringing to a successful conclusion for said Isabel W. Knott, the sum of $1,000; and that said sums are due after allowing to defendant all just credits, deductions and set-offs."

writ of replevin bonding issue. In the meantime, prior to the trial, the Miller Co. had caused the chattel mortgages to be foreclosed on the property which it had received into its possession by virtue of the replevin writ, and the property subsequently was sold at the foreclosure sale, and when the writ of replevin bonding was served on the Miller Co. it did not turn over the property, and the writ was returned unexecuted. It does not appear that any attempt was made by the Miller Co., by appeal or writ of error, to reverse the judgment in the replevin suit.

On November 16, 1949, the present action was commenced against the Maryland Casualty Co., the surety on the replevin bond. In the declaration, consisting of a special count, after setting out the execution of the bond by the Miller Co. as principal and defendant as surety, and also the condition (as above stated), plaintiff alleged in substance that on the trial of the replevin suit there was a finding and judgment in favor of Mrs. Knott, that although a writ of replevin bonding was issued and served, the Miller Co. had failed and refused to return the property, and that thereby "an action has accrued to plaintiff to demand of defendant, for the use aforesaid, the sum of $6,000 above named, yet defendant, though requested, has not paid to plaintiff said sum of money above demanded, or any part thereof, but refuses so to do." The items of special damages are alleged in the declaration, but in the accompanying affidavit of Henry A. Knott, "the duly authorized agent of plaintiff," it is stated:

"That the amount of money due to plaintiff, for the use aforesaid, is $6,000, and interest from the date of replevying that this sum is made up of two items, viz., the reasonable and fair cash value of the goods at the time of replevin, $5,000, and the reasonable attorney's fees for defending and bringing to a successful conclusion for said label", Knott, the sum of $1,000; and that said sums are due after allowing to defendant all just credits, deductions and set-offs."

On October 23, 1929, by leave of court, defendant filed an amended special plea, supported by the affidavit of one of its attorneys. It is therein alleged that plaintiff ought not to recover in this action "any greater damages than the sum of $310.50, because on May 5, 1926, and prior thereto, the goods and chattels described in the replevin bond * * were the goods and chattels of Boyle Bros., which was the owner thereof and had the general right of property therein;" that the chattels were located on certain premises (describing them) in Chicago, then occupied by Boyle Bros., as tenant of Mrs. Knott; that on May 5, 1926, Boyle Bros. was indebted to her "for rent accrued" on said premises in said sum of $310.50, and no more, and was in default in payment thereof;" and that being so in default "she caused to be issued a certain distress warrant." (Then are set forth the distress warrant, the actions of Mrs. Knott thereunder, the commencement of the replevin suit by the Miller Co., etc., the pleadings and the finding and judgment therein, as above mentioned.) And it is further alleged in the plea in substance:

> That by reason of the premises "plaintiff then and there had a special right of property in said goods and chattels to secure the rent accrued before the taking of the same in said replevin action, viz., the sum of $310.50, and had no other right, title or interest therein;" that the Miller Co., principal in the replevin bond, "thereafter caused the chattel mortgages to be duly foreclosed and said goods and chattels to be sold, as by statute in such cases made and provided;" and that thereupon said Miller Co. purchased the same at said foreclosure sale, and is the owner thereof and has the general right of property and title therein, "subject only to the lien of plaintiff aforesaid."

In the affidavit accompanying the special plea it is alleged inter alia that affiant "verily believes that defendant (Maryland Casualty Co., surety on the replevin bond) has a good defense to this suit upon the merits to the whole of plaintiff's demand, except in the sum of $310.50;" and that "plaintiff did not sustain damages as alleged, except in said sum of $310.50."

On October 23, 1959, by leave of court, defendant filed an amended special plea, supported by the affidavit of one of its attorneys. It is therein alleged that plaintiff ought not to recover in this action "any greater damages than the sum of $310.50, because on May 5, 1959, and prior thereto, the goods and chattels described in the replevin bond * * were the goods and chattels of Doyle Bros., which was the owner thereof and had the general right of property thereon;" that the chattels were located on certain premises (described) then occupied by Doyle Bros., as tenant of Mrs. Knott; that on May 5, 1959, Doyle Bros. was indebted to her "for rent accrued" on said premises in said sum of $310.50, and so was; and was in default in payment thereof;" and that being so in default "she needed to be racked a certain distress warrant." (Then are set forth the distress warrant, the notice of Mrs. Knott thereunder, the commencement of the replevin suit by the Miller Co., etc., the pleadings and the finding and judgment therein, as above mentioned.) And it is further alleged in the plea in substance:

That by reason of the premises "plaintiff then and there had a special right of property in said goods and chattels to secure the rent accrued before the taking of the same in said replevin action, viz., the sum of $310.50, and had no other right, title or interest therein;" that the Miller Co., principal in the replevin bond, "therefore caused the rightful mortgagee to be duly foreclosed said said goods and chattels to be sold, as by statute in such cases made and provided;" and that thereupon said Miller Co. purchased the same at said foreclosure sale, and is the owner thereof and has the general right of property and title therein, subject only to the lien of plaintiff aforesaid."

In the affidavit accompanying the special plea it is alleged inter alia that affiant "verily believes that defendant (Maryland Casualty Co., surety on the replevin bond) has a good defense to this suit upon the merits to the whole of plaintiff's demand, except in the sum of $310.50;" and that "plaintiff did not sustain damages as alleged, except in said sum of $310.50."

On November 8, 1929, plaintiff appeared and moved for a partial judgment "on the plea of defendant filed on October 23, 1929." The motion was granted, and thereupon the court entered "a judgment for plaintiff in debt for the penalty of the bond, $6,000, and damages $391, and costs, which includes costs in the replevin suit and also in the distress suit." And the court further ordered that execution issue on the judgment and that the cause be "continued as to the balance of plaintiff's claim." The present record sufficiently discloses that the partial judgment against defendant thereafter was paid. More than a year later, on February 10, 1931, plaintiff filed a replication to defendant's amended plea of October 23, 1929, and after an interval of another year, and following a trial without a jury at which oral and documentary evidence was introduced by each party, the court entered the finding and judgment against defendant as first above mentioned.

Plaintiff's counsel here contends that, under the pleadings and such evidence as was offered and admitted, the court's judgment of $350, as damages, is too small, and that the judgment for damages in plaintiff's favor should have been $5,609, (i.e., the face of the bond, $6,000, less said partial judgment entered as above mentioned against defendant for $391.) The present record does not disclose that during the trial plaintiff introduced evidence to prove the value of the goods taken under the replevin writ, or the reasonable value of the services of plaintiff's attorney in defending the replevin suit. On the trial plaintiff's counsel stated and argued that, on account of the condition of the pleadings, the introduction of evidence on these matters was "unnecessary," because the provisions of section 55 of the Practice Act rendered such proof unnecessary, inasmuch as the affidavit (accompanying plaintiff's declaration) of Henry A. Knott (wherein it was stated that when

On November 8, 1929, plaintiff appeared and moved for a partial judgment "on the plea of defendant filed on October 23, 1929." The motion was granted, and thereupon the court entered "a judgment for plaintiff in esse for the penalty of the bond, $6,000, and damages (?)", and costs, which included costs in the replevin suit and also in the distress suit." And the court further ordered that execution issue on the judgment and that the cause be "continued as to the balance of plaintiff's claim." The present record sufficiently discloses that the partial judgment against defendant thereafter was paid. Here then a year later, on February 10, 1931, plaintiff filed a replication to defendant's amended plea of October 23, 1929, and after an interval of another year, and following a trial without a jury at which oral and documentary evidence was introduced by each party, the court entered the finding and judgment against defendant as first above mentioned.

Plaintiff's counsel here contends that, under the pleadings and such evidence as was offered and admitted, the court's judgment of $330, as damages, is too small, and that the judgment for damages in plaintiff's favor should have been $3,000, (i.e., the face of the bond, $6,000, less said partial judgment entered as above mentioned against defendant for $3?.) The present record does not disclose that during the trial plaintiff introduced evidence to prove the value of the goods taken under the replevin writ, or the reasonable value of the services of plaintiff's attorney in defending the replevin suit. On the trial plaintiff's counsel stated and argued that, on account of the condition of the pleadings, the introduction of evidence on these matters was "unnecessary," because the provisions of section 88 of the Practice Act rendered such proof unnecessary, inasmuch as the affidavit (accompanying plaintiff's declaration) of Henry A. Knott (wherein it was stated that when

the goods were replevied their value was $5,000, and that the reasonable value of plaintiff's attorney's services in defending the replevin suit was $1,000), was not sufficiently denied by the affidavit accompanying defendant's special plea. These same arguments are here made as reasons for sustaining plaintiff's counsel's said contention, but we believe them to be without merit, because

(1) Section 55 of the Practice Act (in force prior to January 1, 1934) by its terms apparently has reference only to a suit "upon a contract, express or implied, for the payment of money," and we do not regard an action in debt upon a replevin bond to be such a suit. It was so held by our Supreme Court in 1859, upon a somewhat similar statute then in force, in the case of Peck v. Wilson, 22 Ill. 205, wherein it is said (p. 207): "Upon the other point we are of the opinion that an action of debt upon a forfeited replevin bond is not such an action on a contract as is contemplated by the third and fourteenth sections of the act regulating the practice in Cook County circuit court and court of common pleas. (Scates' Comp. 271-2.) Those contracts should be held to be contracts for the payment of money, as damages arising from a breach of contract. A replevin bond has not this quality. It has conditions, no one of which is to pay money. The condition is that he will prosecute the suit to effect and without delay, and make return of the property if a return thereof shall be awarded, and save and keep harmless the sheriff. It would be a strained and forced construction of that act, which we are not disposed to give, to bring such cases within it." And we are not aware that the above holdings have been changed by any subsequent decisions of our Supreme Court.

(2) Even if the present suit might be considered as one upon a contract for the payment of money, it is our opinion that

the goods were replevied their value was $3,000, and that the reasonable value of plaintiff's attorney's services in defending the replevin suit was $1,000), was not sufficiently stated by the affidavit accompanying defendant's special plea. These same arguments are here made as reasons for sustaining plaintiff's counsel's said construction, but we believe them to be without merit, because

(1) Section 85 of the Practice Act (in force prior to January 1, 1924) by its terms apparently has reference only to a suit "upon a contract, express or implied, for the payment of money," and we do not regard an action in debt upon a replevin bond to be such a suit. It was so held by our Supreme Court in 1839, upon a somewhat similar statute then in force, in the case of Peck v. Ellison, 22 Ill. 202, wherein it is said (p. 207): "Upon the other point we are of the opinion that an action of debt upon a forfeited replevin bond is not such an action on a contract as is contemplated by the third and fourteenth sections of the act regulating the practice in Cook County circuit court and court of common pleas, (Scates' Comp. 271-2.) These contracts should be held to be contracts for the payment of money, as damages arising from a breach of contract. A replevin bond is not this quality. It has conditions, no one of which is to pay money. The condition is that he will prosecute the suit to effect and without delay, and make return of the property if a return thereof shall be awarded, and save and keep harmless the sheriff. It would be a strained and forced construction of that act, which we are not disposed to give, to bring such cases within it." And we are not aware that the above holdings have been or need by any amendment decisions of our Supreme Court.

(2) Even if the present suit might be considered as one upon a contract for the payment of money, it is our opinion that

defendant's affidavit was such as would not justify the entry of any judgment against it before a trial upon the merits, except the entry of such a partial judgment as was entered on defendant's admissions, contained in its special plea and affidavit.

(3) And, in view of the undisputed evidence that there were valid chattel mortgages on the goods in question (held by the Miller Co., principal on the replevin bond), and that Mrs. Knott claimed a special property interest in the goods only for accrued rent, for which she instituted the distress proceedings, it is our further opinion that the entry of any judgment in her favor on the pleadings, over and above said partial judgment, as well as her proper costs and attorney's fees, would be contrary to justice and against the law. (See King v. Ramsay, 13 Ill. 619, 624-5; David v. Bradley, 79 Ill. 316, 317-8; Sections 22 and 24 Landlord & Tenant Act; Asay v. Sparr, 26 Ill. 115; First National Bank v. Adam, 138 Ill. 433, 504-5.)

In support of the cross-errors assigned, defendant's counsel contends that the court erred in entering the judgment for damages of $350 (which apparently was allowed for attorney's services in defending the replevin action.) The argument is in substance that, as plaintiff in the present suit did not by appropriate allegations in the declaration (as distinguished from statements contained in the affidavit accompanying it) claim damages for such services, and as on the trial plaintiff did not make sufficient proof of the reasonable value of such services, a judgment awarding any sum as damages was erroneous. In view of the facts and circumstances as disclosed from the present record, including statements of counsel during the trial, we find no substantial merit in the contention or argument. We think it sufficiently appears that the contested replevin suit was vigorously defended by an attorney employed by Mrs. Knott and, its

defendant's affidavit was such as would not justify the entry of any judgment against it before a trial upon the merits, except the entry of such a partial judgment as was entered on defendant's admissions, contained in its opening plea and affidavit.

(3) And, in view of the unchallenged evidence that there were valid chattel mortgages on the goods in question (held by the Miller Co., purchasers on the replevin bond), and since Mrs. Knott claimed a special property interest in the goods only for accrued rent, for which she instituted the attachment proceedings, it is our further opinion that the entry of any judgment in her favor on the pleadings, over and above said partial judgment, as well as her proper costs and attorney's fees, would be contrary to justice and against the law. (See Lime v. Kenney, 13 Ill. 618, 624-5; David v. Bradley, 72 Ill. 316, 317-8; sections 22 and 24 Landlord & Tenant Act; Kenny v. Kenny, 28 Ill. 1183; First National Bank v. Adams, 132 Ill. 423, 428-9.)

In support of the cross-error assigned, defendant's counsel contends that the court erred in entering the judgment for damages of $825 (which apparently was allowed for attorney's services in defending the replevin action.) The argument is in substance that, as plaintiff in the present suit did not by appropriate allegations in the declaration (as distinguished from statements contained in the affidavit accompanying it) claim damages for such services, and as on the trial plaintiff did not make sufficient proof of the reasonable value of such services, a judgment awarding any sum as damages was erroneous. In view of the facts and circumstances as disclosed from the present record, including at commencement of counsel during the trial, we find no substantial merit in the contention or argument. We think it sufficiently appears that the counsel's replevin suit was vigorously defended by an attorney employed by Mrs. Knott and, the

outcome being favorable to her, we are unable to say that the award of damages for her attorney's services of $350 was so improper or excessive as to require a reversal of the judgment. In the replevin bond sued upon, one of the conditions is that the obligors shall "pay all costs and damages occasioned by the wrongful suing out of said writ of replevin." And there are several decisions in this State to the effect that the expense of or liability for attorney's fees for services in successfully defending a replevin suit are to be considered as damages under replevin bonds containing similar conditions. (Siegel v. Hanchett, 33 Ill. App. 634, 637-8; Moore v. Paul F. Beech Co., 221 Ill. App. 609, 612.)

Our conclusion is that the judgment in question of February 11, 1932, should be affirmed, and it is so ordered.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

outcome being referable to her, we are unable to say that the award of damages for her attorney's services of $350 was so improper or excessive as to require a reversal of the judgment. In the replevin bond sued upon, one of the conditions is that the obligors shall "pay all costs and damages occasioned by the wrongful suing out of said writ of replevin." And there are several decisions in this State to the effect that the expense of or liability for attorney's fees for services in successfully defending a replevin suit are to be considered as damages under replevin bonds containing similar conditions. (Sigel v. Hanchett, 33 Ill. App. 634, 637-8; Moore v. Paul v. Moon Co., 221 Ill. App. 609, 612.)

Our conclusion is that the judgment in question of February 11, 1932, should be affirmed, and it is so ordered.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

37092

EMILO SARTO,
Appellant,

vs.

FRED W. VOGT,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

63

275 I.A. 637

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in trover for damages for the claimed unlawful conversion by defendant of certain chattels and equipment, generally used by bakers, there was a trial before a jury in March, 1933, resulting in the return of a verdict finding defendant guilty, and assessing plaintiff's damages at the sum of $75. On April 7, 1933, plaintiff's motion for a new trial was overruled and judgment was entered against defendant on the verdict in said sum. From the judgment plaintiff prosecutes the present appeal, and the sole contention of his counsel is that the damages awarded by the jury are so "grossly inadequate" as requires a reversal of the judgment and the remandment of the cause.

Upon the trial plaintiff testified in his own behalf and three other witnesses for him. Defendant also testified and his testimony was corroborated in certain particulars by two witnesses called by him. Defendant also introduced in evidence two chattel mortgages, which successively were valid liens on the property in question. Plaintiff's evidence on the issue of the claimed unlawful conversion by defendant of the property was unsatisfactory, but defendant is not here complaining of the judgment rendered against him. There was evidence tending to show the following facts in substance:

During March, 1932, Vogt (defendant) sold to one Calabrese certain chattels and bakery equipment located in a store at 2963 West 63rd Street, Chicago, and Calabrese gave back to him a chattel mortgage on the property to secure the sum of $450, payable in monthly installments thereafter,--final payment to be made on

37008

EMILIO SANTO,
Appellant,

vs.

NEAL W. VOGT,
Appellee.

APPEAL FROM THE THIRD COURT
OF APPEALS.

215 L.Ed. 687

MR. JUSTICE BRENNAN DELIVERED THE OPINION OF THE COURT.

In a 5th Circuit action in tort for damages for the claimed unlawful conversion by defendant of certain equipment and furniture, generally used by lessees, there was a trial before a jury in March, 1933, resulting in the return of a verdict finding defendant guilty, and assessing plaintiff's damages at the sum of $75. On April 7, 1933, plaintiff's motion for a new trial was overruled and judgment was entered against defendant on the verdict in said sum. Upon the judgment plaintiff recovered the same [illegible], and the sole contention of his counsel is that the damages assessed by the jury are so "grossly inadequate" as reflecting a disregard of our judgment and the requirements of the court.

[illegible] the trial plaintiff testified in his own behalf and three other witnesses [illegible]. [illegible] plaintiff's and his testimony was corroborated in certain particulars by two witnesses called by [illegible]. [illegible] testimony of witnesses for defendant, which [illegible] were variously [illegible] in question, [illegible] the evidence of [illegible] the [illegible] and actual conversion by defendant of the property was undisputed, but defendant is not [illegible] of the [illegible] [illegible] him. There was evidence [illegible] to show the following facts in substance:

During March, 1932, Vogt (defendant) [illegible] certain furniture, certain equipment and [illegible] furniture [illegible] Vogt and [illegible] mortgage on the property [illegible] amount of $[illegible], payable in monthly installments [illegible] to be made on

September 5, 1933. During May, 1932, Santo (plaintiff) purchased of Calabrese the bakery business there located, and said property which was subject to said chattel mortgage. It was arranged that Santo was to give, and he gave, a new chattel mortgage on the property to Vogt for the balance then due thereon of $375, under substantially the same terms as in the former mortgage. Thereafter Santo paid to Vogt $50 on account of maturing indebtedness under the terms of the new chattel mortgage,--leaving the balance of the indebtedness $325. During July, 1932, Santo called on Vogt, advised him that he (Santo) could not successfully run the business at said store, and Santo surrendered the keys to the store. He expressed the desire that Vogt sell the place for him, store the mortgaged property and pay all storage charges, which Vogt refused to do. Thereafter Vogt, finding some of the property missing and some in a bad state of repair or depreciated in value, and feeling himself insecure, decided to foreclose the mortgage and so notified Santo. At the sale, of which Santo was notified but did not attend, the mortgaged property was sold to one Lutz for $375, but no cash was paid,--Lutz giving his note for such sum, secured by still another chattel mortgage. At the time of the foreclosure sale Santo owed Vogt a balance of $325, or $50 less than the face amount of the sale to Lutz. Thereafter, during August, 1932, Santo commenced the present suit. Upon the trial the testimony of the witnesses as to the value of the property at the time of said foreclosure was very conflicting.

After reviewing all the testimony as to the then value of the property, and considering the fact that plaintiff was still indebted to defendant on said mortgage on the property in the sum of $325, we are unable to say that there is any substantial merit in plaintiff's counsel's contention as first above mentioned. What the value of the property was, and what plaintiff's damages were (if any), were questions peculiarly within the jury's province to determine.

The judgment should be and is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

September 2, 1922. During May, 1922, Santo (plaintiff) purchased of Calderone the bakery business there located, and said property which was subject to said chattel mortgage. It was arranged that Santo was to give, and he gave, a new chattel mortgage on the property to Vogt for the balance then due thereon of $375, under substantially the same terms as in the former mortgage. Thereafter Santo paid to Vogt $75 on account of maturing indebtedness under the terms of the new chattel mortgage,--leaving the balance of the indebtedness $300. During July, 1923, Santo called on Vogt, advised him that he (Santo) could not successfully run the business at said store, and Santo arrangement was given to the store. He expressed the desire that Vogt sell the store for him, strike the mortgaged property and pay all storage charges, which Vogt refused to do. Thereafter Vogt, taking some of the property missing and some in a bad state of repair or depreciated in value, and feeling himself insecure, desired to foreclose the mortgage and so notified Santo. At the sale, at which Santo was notified but did not attend, the mortgaged property was sold to the bank for $375, out of cash was paid,--bank giving his note for the balance, secured by still another chattel mortgage. At the time of the foreclosure sale Santo owed Vogt a balance of $75, or $75 less than the face amount of the sale to bank. Thereafter, during August, 1923, Santo commenced the present suit. Upon the trial the testimony of the witnesses as to the value of the property at the time of said foreclosure was very conflicting.

After reviewing all the testimony as to the true value of the property, and considering the fact that plaintiff was still indebted to defendant on said mortgage on the property in the sum of $300, we are unable to say that there is any substantial merit in plaintiff's contention as to first three matters. What the value of the property was, and what plaintiff's damages were (if any), were questions peculiarly within the jury's province to determine.

The judgment should be and is affirmed.

(Signed).

Dolliver, P. J., and Bennett, J., concur.

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37134

SOUTHWAY HOTEL CORPORATION,
Appellee,

v.

EBBIE HORTON,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

275 I.A. 637

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On May 2, 1933, plaintiff filed a complaint in forcible detainer against defendant to recover from her the possession of the "North portion of the ground floor of the building at 6012 South Parkway, Chicago, located in the building known as the Southway Hotel." On May 24, 1933, after a trial without a jury at which oral and written evidence was introduced by each party, the court found defendant guilty of unlawfully withholding the possession of the premises and that the right to such possession is in plaintiff. And the court entered judgment against defendant on the finding that plaintiff have and recover of and from her such possession, and that a writ of restitution issue. Such writ was stayed by the court's order for 14 days, and during the interval defendant perfected the present appeal from the judgment, which she here seeks to reverse.

On the trial William Cummings, plaintiff's president, testified in its behalf and defendant and her mother, Emma Horton, gave testimony. Certain writings were introduced. Plaintiff's theory, sustained by Cummings' testimony and other evidence, is in substance that on March 1, 1932, or shortly prior thereto, defendant became a tenant of the premises under a verbal agreement that she should have a month to month tenancy, subject to termination at any

STILL

SOUTHWAY HOTEL CORPORATION,
Appellee,

v.

BASIL NORTON,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

275 I.A. 637

MR. JUSTICE DONAHOE DELIVERED THE OPINION OF THE COURT.

On May 2, 1932, plaintiff filed a complaint in forcible detainer against defendant to recover from him the possession of the "North portion of the ground floor of the building at 6032 South Parkway, Chicago, located in the building known as the Southway Hotel." On May 24, 1932, after a trial without a jury at which oral and written evidence was introduced by each party, the court found defendant guilty of unlawfully withholding the possession of the premises and that the right to such possession is in plaintiff. And the court entered judgment against defendant on the finding that plaintiff have and recover of and from her such possession, and that a writ of restitution issue. Such writ was stayed by the court's order for 15 days, and during the interval defendant perfected the present appeal from the judgment, which she here seeks to reverse.

At the trial William Swanigan, plaintiff's president, testified in his behalf and defendant and her mother, Anna Norton, gave testimony. Certain writings were introduced. Plaintiff's theory, sustained by Swanigan's testimony and other evidence, is in substance that on March 1, 1932, or shortly prior thereto, defendant became a tenant of the premises under a verbal agreement that she should have a month to month tenancy, subject to termination at any

time upon thirty days' notice in writing, at a rental of $30 a month; that she paid such rental each month from March 1, 1932, to and including April 1, 1933; that during March, 1933, plaintiff elected to terminate defendant's tenancy on May 1, 1933; that such election and termination is based upon the service upon defendant of a notice in writing on March 27, 1933, signed by plaintiff and dated March 27, 1933, (introduced in evidence), notifying her that "Your tenancy of the following premises (describing them) will terminate on May 1, 1933, and you are hereby required to surrender possession of said premises on that day;" and that she did not surrender the premises, but continued to occupy and was occupying them when the present action was commenced.

Counsel for defendant here contend that the finding and judgment are (1) manifestly against the weight of the evidence, and (2) contrary to the law. After reading defendant's abstract, plaintiff's additional abstract, and numerous portions of the record, we are of the opinion that there is no merit in either of the contentions. Defendant's theory of defense is in substance that at a time prior to March 1, 1932, she entered into a verbal agreement with Cummings that she should have a year's lease of the premises commencing March 1, 1932, at $30 a month or $360 for the year; that, after the expiration of the year on March 1, 1933, plaintiff accepted rent from her for the months of March, 1933, and April, 1933, at said rate of $30 a month; and that thereby she became a "holdover tenant for another year" and "under a year to year tenancy." While defendant's testimony is to the effect that such a verbal agreement for a year's lease was made, it is undisputed that no written lease ever was executed, and Cummings' testimony is to the effect that the only verbal agreement made was for a month to month tenancy. And even if such an agreement was made, as

time upon thirty days' notice in writing, at a rental of $30 a month; that she paid such rental each month from March 1, 1932, to and including April 1, 1933; that during March, 1933, plaintiff elected to terminate defendant's tenancy on May 1, 1933; that such election and termination is based upon the service upon defendant of a notice in writing on March 27, 1933, signed by plaintiff and dated March 27, 1933, (introduced in evidence), notifying her that "Your tenancy of the following premises (describing them) will terminate on May 1, 1933, and you are hereby required to surrender possession of said premises on that day" and that she did not surrender the premises, but continued to occupy and was occupying them when the present action was commenced.

Counsel for defendant here contend that the finding and judgment are (1) manifestly against the weight of the evidence, and (2) contrary to the law. After reading defendant's abstract, plaintiff's additional abstract, and numerous portions of the record, we are of the opinion that there is no merit in either of the contentions. Defendant's theory of defense is in substance that at a time prior to March 1, 1932, she entered into a verbal agreement with claimants that she should have a year's lease of the premises commencing March 1, 1932, at $30 a month or $360 for the year; that, after the expiration of the year on March 1, 1933, plaintiff accepted rent from her for the month of March, 1933, and April, 1933, at said rate of $30 a month; and that thereby she became a "holdover tenant for another year" and "under a year to year tenancy." While defendant's testimony is to the effect that such a verbal agreement for a year's lease was made, it is unchallenged that no written lease ever was executed, and claimants' testimony is to the effect that the only verbal agreement made was for a month to month tenancy. And even if such an agreement was made, as

testified by her, it is one void under our Statute of Frauds, and, as well settled in this State, she became only a tenant from month to month. (Warner v. Hale, 65 Ill. 395, 396; Brownell v. Welch, 91 Ill. 523, 524; Bergamo v. Tarello, 183 Ill. App. 314, 315.) And it is equally well settled that a verbal agreement for a lease for a year to begin in future is void under our Statute of Frauds. (Leindecker v. Schaeffer, 194 Ill. App. 508, 509.)

The judgment of the municipal court of May 24, 1933, appealed from, should be and is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

testified by her, it is one void under our Statute of Frauds, and, as well settled in this state, she became only a tenant from month to month. (Barker v. Kane, 65 Ill. 395, 396; Brownell v. Bolon, 91 Ill. 592, 594; Bertram v. Ingalls, 165 Ill. App. 314, 316.) And it is equally well settled that a verbal agreement for a lease for a year to begin in future is void under our Statute of Frauds. (Lichtenkow v. Schaeffer, 164 Ill. App. 302, 304.)

The judgment of the municipal court of May 24, 1932, appealed from, should be and is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

37161

CHICAGO TITLE & TRUST CO.,
a corporation, as Trustee,
and SUPREME COUNCIL OF THE
ROYAL ARCANUM, a corporation,
Complainants and Appellees,

v.

ETHEL LEVY and ABE LEVY, her husband
et al.,
Defendants.

ETHEL LEVY,
Appellant.

275 I.A. 638

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal Ethel Levy seeks to reverse a decree for the foreclosure and sale of certain improved real estate in Cook county, Illinois, entered by the circuit court on May 26, 1933, following the report and recommendation of a master, in which decree the court adjudged that, unless the defendants or one of them within five days pay or cause to be paid to the complainant, Supreme Council of the Royal Arcanum, the sum of $233,537.87, together with interest at the rate of five per cent per annum from December 12, 1932, and also pay the taxed costs and the sum of $12,500 for complainants' allowed solicitors' fees, and also pay other mentioned sums to two other named parties respectively, the said real estate be sold at public vendue by the master in the usual manner, etc.

The bill was filed on August 6, 1931. The sole complainant originally was the Chicago Title and Trust Co., as Trustee, named as such in the trust deed sought to be foreclosed.

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CHICAGO TITLE & TRUST CO.,
a corporation, as Trustee,
and SUPREME COUNCIL OF THE
ROYAL ARCANUM, a corporation,
Complainants and Appellees,

v.

ETHEL LEVY and ABE LEVY, her husband
et al.,
Defendants.

ETHEL LEVY,
Appellant.

275 I.A. 638

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE GRIFFEY DELIVERED THE OPINION OF THE COURT.

By this appeal Ethel Levy seeks to reverse a decree for the foreclosure and sale of certain improved real estate in Cook county, Illinois, entered by the circuit court on May 26, 1933, following the report and recommendation of a master, in which decree the court adjudged that, unless the defendants or one of them within five days or cause to be paid to the complainant, Supreme Council of the Royal Arcanum, the sum of $233,827.87, together with interest at the rate of five per cent per annum from December 12, 1932, and also pay the taxed costs and the sum of $12,800 for complainants' allowed solicitors' fees, and also pay other mentioned sums to two other named parties respectively, the said real estate be sold at public vendue by the master in the usual manner, etc.

The bill was filed on August 6, 1931. The sole complainant originally was the Chicago Title and Trust Co., as Trustee, named as such in the trust deed sought to be foreclosed,

The two Levys filed an answer, as did the Prudence Company, Inc., in which it admitted all of the material allegations of the bill and that complainant was entitled to the relief as prayed. After a hearing was had before the master and after his report was filed, but before the entry of the decree, the court ordered that the Supreme Council of the Royal Arcanum be joined as a party complainant in the cause, without prejudice to the proceedings had before the master, who in his report had recommended that a decree of foreclosure be entered in accordance with certain findings therein contained. In the decree, entered upon the motion of both complainants, the court confirmed the master's report, except as specifically modified, and, after finding that the material allegations of the bill as amended were true and that the equities were with complainants, further found in part substantially as follows:

> That on November 16, 1927, the two Levys, being indebted in the principal sum of $210,000, executed and delivered their note of that date and in that sum payable to bearer in installments, and bearing interest at the rate of 6 per cent per annum, payable semi-annually, said installments being in varying amounts commencing on May 16, 1929, and payable every six months thereafter until November 16, 1937, when the last principal installment of $132,000 matured; that to secure the payment of the principal indebtedness and interest the Levys executed and delivered to the Chicago Title & Trust Co., as trustee, their trust deed, dated November 16, 1927, recorded November 23, 1927, conveying and warranting to it said improved real estate (describing it), "and the rents, issues and profits thereof;" that it was provided in the trust deed inter alia that the first party (the Levys) should pay all of said indebtedness, keep the premises in good repair, pay all taxes and impositions, not suffer any lien to attach to the premises, not alter or demolish any improvement thereon, comply with all laws and ordinances, keep the buildings and fixtures insured against loss or damage by fire, and pay said principal and interest without deduction for any United States or State income taxes; that in case of default in the payment of any installment of principal for 15 days, or in the payment of any installment of interest for 15 days, "or in case of default in the payment of any deposit or deposits hereunder to the Prudence Company, Inc., of Illinois, for a period of 20 days after the same shall become due," or in case of a breach of any of the covenants, conditions and undertakings to be performed by the Levys, etc., "then the whole of said principal sum hereby secured shall at once at the option of the holder of said principal note become immediately due and payable, without notice" to the Levys, etc., and that, thereupon,

The two Levys filed an answer, as did the Guarantee Company, Inc., in which it admitted all of the material allegations of the bill and that that complainant was entitled to the relief as prayed. After a hearing was had before the master and after his report was filed, but before the entry of the decree, the court ordered that the Supreme Council of the Royal Arcanum be joined as a party complainant in the cause, without prejudice to the proceedings had before the master, who in his report had recommended that a decree of foreclosure be entered in accordance with certain findings therein contained. In the decree, entered upon the motion of both complainants, the court confirmed the master's report, except as specifically modified, and, after finding that the material allegations of the bill as amended were true and that the entities were both complainants, further found in part substantially as follows:

> That on November 16, 1927, the two Levys, being indebted in the principal sum of $410,000, executed and delivered their note of that date and in that sum payable to bearer in installments, and bearing interest at the rate of 6 per cent per annum, payable semi-annually, said installments being in varying amounts commencing on May 16, 1929, and payable every six months thereafter until November 16, 1937, when the last principal installment of $132,000 matured; that to secure the payment of the principal indebtedness and interest the Levys executed and delivered to the Chicago Title & Trust Co., as trustee, their trust deed, dated November 16, 1927, recorded November 23, 1927, conveying and warranting to it said improved real estate (describing it), "and the rents, issues and profits thereof;" that it was provided in the said trust deed inter alia that the first party (the Levys) should pay all of said indebtedness, keep the premises in good repair, pay all taxes and impositions, not suffer any lien to attach to the premises, not alter or demolish any improvement thereon, comply with all laws and ordinances, keep the buildings and fixtures insured against loss or damage by fire, and pay said principal and interest without deduction for any United States or State income taxes; that in case of a default in the payment of any installment of principal for 15 days, or in the payment of any installment of interest for 15 days, or in case of default in the payment of any deposit or deposits hereunder to the Guarantee Company, Inc., of Illinois, for a period of 20 days after the same shall become due," or in case of a breach of any of said covenants, conditions and undertakings, to be performed by the Levys, etc., then the whole of said principal sum hereby secured shall at once at the option of the holder of said principal note "become immediately due and payable, without notice" to the Levys, etc., and that thereupon,

the holder of said principal note, or the second party (Chicago Title and Trust Co., as trustee) for the benefit of said holder, "shall have the right immediately to foreclose this indenture;" that in any foreclosure proceeding the court shall, upon application, at once and without notice to the Levys or anyone claiming under them, appoint a receiver to collect the rents and profits of the premises, etc., and without reference to the then value of the premises, or the solvency or insolvency of any person liable for said indebtedness; and that upon any foreclosure suit being instituted a reasonable sum shall be allowed under each foreclosure for the solicitor's fees of the party seeking the foreclosure.

That there was default in the payment of the 1928 and 1929 general taxes on the premises; that all installments of interest accruing to November 16, 1930, were duly paid; that subsequent thereto payments on account of interest, aggregating $3,270.42, where made; that the Supreme Council of the Royal Arcanum is the owner of the principal note of $210,000, and of the trust deed securing the same; that installments of principal in the sum of $3,000, each, matured on May 16th and November 16th, 1929, respectively; that installments of principal in the sum of $3,500 each, matured on May 16th and November 16th, 1930, respectively; that an installment of principal in the sum of $5,000, matured on May 16, 1931; that all of said installments of principal were <u>not</u> paid by the Levys or any one for them; that the defaults continued for a period of more than 15 days thereafter; that "further default was made in making deposits with the Prudence Company, Inc., on account of United States Income Taxes as required in the trust deed, which default continued for more than 15 days and still continues;" that by reason of the above defaults the Supreme Council of the Royal Arcanum, legal owner and holder of the principal note, elected to declare the whole amount of the note and all accrued interest thereon and all accrued costs and expenses to be immediately due and payable and notified the trustee, Chicago Title & Trust Co., of such election; and that it, as such trustee, pursuant to such notification and the provisions of the trust deed "elected to, and did, by the filing of the bill of complaint herein, elect to foreclose the lien of said trust deed for the indebtedness due thereunder."

That the mortgagors, the Levys, under the provisions of the trust deed, are required to make payments for United States Income Taxes and charges which the trustee or holder of the principal note may be required to pay thereon, and that they are indebted to the legal holder of the indebtedness, based upon 2% of the sum of $23,100 in lieu of income tax, in the sum of $462; that complainants were compelled to and did expend the sum of $219.50 for minutes of foreclosure, paid to the Chicago Title & Trust Co., which sum constitutes an additional indebtedness under the trust deed; that under the provisions of the trust deed complainants are entitled to recover herein a reasonable amount as their solicitor's fees; and that a fair, reasonable and usual charge in this county for the services rendered by their solicitors is the sum of $12,500.

That there is now due and owing to the complainant, Supreme Council of the Royal Arcanum, upon said principal note of $210,000, and including accrued interest, said advances, etc.,

the holder of said principal note, or the second party (Chicago Title and Trust Co., as trustee) for the benefit of said holder, "shall have the right immediately to foreclose this instrument; that in any foreclosure proceeding the court shall, upon application, at once and without notice to the party or anyone claiming under them, appoint a receiver to collect the rents and profits of the premises, etc., and without reference to the then value of the premises, or the solvency or insolvency of any person liable for said indebtedness; and that upon any foreclosure suit being instituted a reasonable sum shall be allowed under each foreclosure for the solicitor's fee of the party seeking the foreclosure.

That there was default in the payments on the 1928 and 1929 general taxes on the premises; that all installments of interest according to November 1, 1932, were duly paid; that subsequent thereto payments on account of interest, aggregating $4,370.42, where made; that the Supreme Council of the Royal Arcanum is the owner of the principal note of $10,000, and of the trust deed securing the same; that installments of principal in the sum of $3,000, each, matured on May 1, 1928 and November 1, 1928, respectively; that installments of principal in the sum of $3,500 each, matured on May 1, 1929 and November 1, 1929, respectively; that an installment of principal in the sum of $3,000, matured on May 1, 1931; that all of said installments of principal were not paid by the payee or any one on behalf; that the default continued for a period of more than 15 days thereafter; that further default was made in making payments of principal in the same company, on account of United Income Income Tax on the principal note in the trust deed, which default continued for more than 15 days and still continues;" that by reason of the above default the Supreme Council of the Royal Arcanum, legal owner and holder of the principal note, elected to declare the whole amount of the note and all accrued interest thereon and all costs and expenses to be immediately due and payable and notified the trustee, Chicago Title and Trust Co., of such election; and that in such events, pursuant to such notification and the provisions of the trust deed "election to, and did, by the filing of the bill of complaint herein, elect to foreclose the lien of said trust deed, for the indebtedness and thereunder."

That the mortgagors, the Kerns, under the provisions of the trust deed, are required to make payments for United Income Taxes and charges which the trustee or holder of the principal note may be required to pay thereon, and that they are indebted to the legal holder of the indebtedness, based upon 4% of the sum of $22,500 in lieu of income tax. In the sum of $1,620; that complainants were compelled to and did expend the sum of $210.80 for abstracts of foreclosure, paid to the Chicago Title & Trust Co., which sum constitutes an additional indebtedness under the trust deed; that under the provisions of the trust deed complainants are entitled to recover herein a reasonable amount, their solicitor's fees; and that a fair, reasonable and usual charge in this county for the services rendered by their solicitors is the sum of $1,[illegible].

That there is no [illegible] on the premises; the Supreme Council of the Royal Arcanum, upon said principal note of $10,000, and in Liens secured thereby, [illegible] Co.,

(set forth in an itemized account) the total sum of $233,537.87, plus the further sum for allowed solicitor's fees of $12,500, or a total of $246,037.87, besides the taxable costs; that complainants have a valid and subsisting lien upon the said premises, and upon the rents, issues and profits thereof, for said sum of $233,537.87, with interest thereon at the rate of 5% per annum from December 12, 1932, to the date of the entry of this decree, together with the taxable costs and the further sum of $12,500 for complainants' allowed solicitor's fees; and that complainants are entitled to a foreclosure of the trust deed and a sale of the premises for the purpose of satisfying the said lien.

That the Levys voluntarily entered their appearances in the cause, are the makers of the principal note and trust deed and, therefore, are personally liable to the complainant, Supreme Council of the Royal Arcanum, for said sum of $233,537.87, together with interest thereon as aforesaid, and all taxable costs and also the further sum of $12,500 for complainants' solicitor's fees; and that the said master in chancery is entitled to receive the sum of $1,113.50, as and for his costs and fees and for court reporter's charges.

Counsel for Ethel Levy contends in substance that the evidence heard before the master does not sufficiently support the allegations of the bill. After reviewing the bill and the evidence we cannot agree with the contention.

Counsel also contends in substance that the assignment of rents and the surrender of possession of the premises to the Prudence Co., Inc., a guarantor of the indebtedness, and its acceptance of said assignment and surrender, "estopped" the Chicago Title and Trust Co., as trustee, and the Supreme Council of the Royal Arcanum, as owner of the principal note, from prosecuting the present foreclosure proceedings. After considering the allegations of the bill and of the answer of the Levys thereto, the provisions of the trust deed, the evidence, and the arguments of opposing counsel bearing upon the point, we are of the opinion that the contention is without merit. In the Levys' answer to the bill they set forth the written assignment of the rents, made by them to the Prudence Co., Inc., on February 21, 1931, and alleged that said assignment was delivered "upon the distinct understanding and express consideration" that no action should be taken by said

(set forth in an itemized account) the total sum of $233,397.47, plus the further sum for allowed collector's fees of $15,000, or a total of $248,397.47, besides the taxable costs that complainants have a valid and subsisting lien upon the said premises, and upon the rents, issues and profits thereof, for said sum of $233,397.47, with interest thereon at the rate of 6% per annum from December 15, 1932, to the date of the entry of this decree, together with the taxable costs and the further sum of $15,000 for complainants' allowed collector's fees; and that complainants are entitled to a foreclosure of the trust deed and a sale of the premises for the purpose of satisfying the said lien.

That the boys voluntarily caused their appearance in the cause, are the makers of the principal note and trust deed and, therefore, are personally liable to the complainant, Supreme Council of the Royal Arcanum, for sum of $233,397.47, together with interest thereon as aforesaid, and all taxable costs and also the further sum of $15,000 for complainants' collector's fees; and that the said master in chancery is entitled to receive the sum of $1,115.80, as and for his costs and fees for court reporter's charges.

Counsel for Ethel Levy contends in substance that the evidence heard before the master does not adequately support the allegations of the bill. [illegible] reviewing the bill and the evidence we cannot agree with the contention.

Counsel also contends in substance that the assignment of rents and the surrender of possession of the premises to the Prudence Co., Inc., a guarantor of the indebtedness, and the acceptance of said assignment [illegible], "stripped" the Chicago Title and Trust Co., as trustee, and the Supreme Council of the Royal Arcanum, as owner of the principal note, from prosecuting the present foreclosure proceedings. After considering the allegations of the bill and of the answer of the Levys [illegible], the provisions of the trust deed, the evidence, and the arguments of opposing counsel bearing upon the point, we are of the opinion that the contention is without merit. In the Levys' answer to the bill they set forth the written assignment of the rents, made by them to the Prudence Co., Inc., on January 21, 1931, and alleged that said assignment was delivered "upon the distinct understanding and express consideration" that no action would be taken by said

Prudence Co. to foreclose, etc. But no sufficient evidence was introduced supporting that allegation. Counsel for Ethel Levy, after referring to said assignment, argue in substance that it is a fair "implication" from certain language of the assignment that the guarantor (Prudence Co.) "in effect" waived any right it might otherwise have had to compel defendants strictly to comply with the terms and provisions of the note and trust deed. We find no merit in the argument. The trust deed, originally executed by the Levys, conveyed to the complainant trustee the premises and the rents, issues and profits thereof. Although the written assignment of the rents on February 21, 1931, by the Levys to the Prudence Co. may have been of some benefit to complainants, we fail to find elements of estoppel arising which would legally prevent either complainant, or both, from prosecuting the present foreclosure proceedings.

And, answering other contentions urged by counsel for Ethel Levy, we are of the opinion, after considering the pleadings, the provisions of the trust deed and the evidence, (a) that the present foreclosure proceedings were properly instituted on August 6, 1931, by the Chicago Title & Trust Co., as trustee in the trust deed; (b) that before the entry of the decree it was proper for the court to order that the Supreme Council of the Royal Arcanum, the holder and owner of the principal note, be joined as a party complainant; (c) that the total mortgage indebtedness was properly accelerated; (d) that said total indebtedness was due and owing to said holder of the principal note when the bill of complaint was filed on August 6, 1931; and (e) that on the date of the entry of the decree in question (May 26, 1933) there was due and owing to said holder of said note, as found by the court, the total sum, including accrued interest, advances, etc., of $233,537.87, besides

Prudence Co. to foreclose, etc. But no sufficient evidence was introduced supporting that allegation. Counsel for Ethel Levy, after referring to said assignment, argue in substance that it is a fair "implication" from certain language of the assignment that the guarantor (Prudence Co.) "in effect" waived any right it might otherwise have had to compel defendants strictly to comply with the terms and provisions of the note and trust deed. We find no merit in the argument. The trust deed, originally executed by the Levys, conveyed to the complainant trustee the premises and the rents, issues and profits thereof. Although the written assignment of the rents on February 21, 1931, by the Levys to the Prudence Co. may have been of some benefit to complainants, we fail to find elements of estoppel arising which would legally prevent either complainant, or both, from prosecuting the present foreclosure proceedings.

And, answering other contentions urged by counsel for Ethel Levy, we are of the opinion, after considering the pleadings, the provisions of the trust deed and the evidence, (a) that the present foreclosure proceedings are properly instituted on August 6, 1931, by the Chicago Title and Trust Co., as trustee in the trust deed; (b) that before the entry of the decree it was proper for the court to order that the Illinois Bankers of Chicago, as the legal owner of the note, be joined as a party complainant; (c) that the total mortgage indebtedness was properly accelerated; (d) that such total indebtedness was due and owing to said holder of the principal note when the bill of complaint was filed on August 6, 1931; and (e) that on the date of the entry of the decree in question (May 26, 1932) there was due and owing to said holder of said note, as found by the court, the total sum, including accrued interest, advances, etc., of $[illegible], besides

taxable costs, and also the sum of $12,500, allowed by the court as complainants' solicitor's fees. Counsel for Ethel Levy does not here urge that said allowance for solicitor's fees is excessive.

Our conclusion is that the decree appealed from should be affirmed and it is so ordered.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

taxable costs, and also the sum of $12,500, allowed by the court as complainants' solicitor's fees. Counsel for libel have does not here urge that said allowance for solicitor's fees is excessive.

Our conclusion is that the decree appealed from should be affirmed and it is so ordered.

AFFIRMED.

Sullivan, P. J., and Gaskins, J., concur.

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37308

ROSE KIMEN,
Defendant in Error,

v.

ATLAS EXCHANGE NATIONAL BANK
OF CHICAGO, a corporation,
Plaintiff in Error.

ERROR TO CIRCUIT COURT,

COOK COUNTY.

275 I.A. 638

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This writ of error was sued out on December 28, 1933, to the February term, 1934, of this court. On March 7, 1934, on motion of defendant in error, the case was ordered to be consolidated for hearing with case No. 37307, Awotin v. Atlas Exchange National Bank, and subsequently the two cases were advanced for hearing and were heard on oral argument and printed briefs submitted. An opinion has this day been filed in the Awotin case.

The Atlas Exchange National Bank, defendant in the trial court, here seeks to reverse a judgment against it for $4,330.47, entered by the circuit court of Cook county in plaintiff's favor on January 30, 1932, following the verdict of a jury. The action, which is in assumpsit, was commenced on August 19, 1930. Plaintiff's declaration, filed September 5, 1930, consisted of the common counts and a special count. In the special count plaintiff alleged in substance:

That on November 2, 1929, at Chicago, the Atlas Bank offered to sell to plaintiff "$4,000, First National Company, Collateral Trust, Series 'O' First Mortgage Real Estate 5-1/2% Gold Bonds," in denomination of $1,000 each, and then and there "promised that if plaintiff purchased said bonds and paid therefor the sum of $4,000, together with the accrued interest thereon, it (defendant) would repurchase from plaintiff the said bonds at maturity, paying therefor par value of the bonds and accrued

37308

MOSE KIMON,
Defendant in Error,

v.

ATLAS EXCHANGE NATIONAL BANK
OF CHICAGO, a corporation,
Plaintiff in Error.

MENSON BY CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SHINNEY DELIVERED THE OPINION OF THE COURT.

This writ of error was sued out on November 28, 1933, to the February term, 1934, of this court. On March 7, 1934, on motion of defendant in error, the case was ordered to be consolidated for hearing with case No. 37307, Austin v. Atlas Exchange National Bank, and subsequently the two cases were advanced for hearing and were heard on oral argument and printed briefs submitted. An opinion has this day been filed in the Austin case.

The Atlas Exchange National Bank, defendant in the trial court, here seeks to reverse a judgment against it for $4,330.47, entered by the circuit court of Cook county in plaintiff's favor on January 26, 1932, following the verdict of a jury. The action, which is in assumpsit, was commenced on August 19, 1930. Plaintiff's declaration, filed September 5, 1930, consisted of the common counts and a special count. In the special count plaintiff alleged in substance:

That on November 2, 1929, at Chicago, the Atlas Bank offered to sell to plaintiff "$4,000, First National Company, Collateral Trust, series 'C' First Mortgage Real Estate 5-1/2% Gold Bonds," in denomination of $1,000 each, and then and there "promised that if plaintiff purchased said bonds and paid the price for the sum of $4,000, together with the accrued interest thereon, it (defendant) would repurchase from plaintiff the said bonds at maturity, paying thereafter par value of the bonds and accrued

interest thereon;" that plaintiff, in consideration thereof, on November 2, 1929, paid to defendant the sum of $4,000 and purchased from it the bonds; that to evidence the agreement defendant reduced it to writing; and that "as an inducement to plaintiff to purchase said bonds," defendant then and there delivered to plaintiff the following writing:

"November 2, 1929.

Rose Kimen,
Chicago, Ill.
Dear Madam:

This is to acknowledge that we have this day sold you $4,000, par value, First National Company, Collateral Trust, First Mortgage, Series 'O' Real Estate 5-1/2% Gold Bonds, in denomination of $1,000 each, numbered 4595-4596-4599 and 4600.

Should you desire to resell these bonds to us, we hereby agree to repurchase same at maturity at par, or $4,000, and accrued interest.

Yours very truly,
(Signed) B. M. Blankenheim,
Cashier."

That the bonds matured on July 15, 1930; that on that day plaintiff presented them to defendant and demanded that it repurchase them and pay to plaintiff the sum of $4,000 and the accrued interest; that defendant refused to repurchase the bonds and, although plaintiff has made repeated demands subsequent to July 15, 1930, upon it to repurchase them "in accordance with said agreement," yet defendant has not paid said sum of $4,000 and accrued interest, or any part thereof, to plaintiff, and refuses so to do; to plaintiff's damage, etc.

Accompanying the declaration, and on the reverse side of the printed form of the common counts, is "plaintiff's affidavit of amount due," sworn to by Thomas C. Kennedy on September 4, 1930, in substance that plaintiff's demand is for the sum of $4,250, "due and owing from defendant to plaintiff <u>under its written agreement dated November 2, 1929;</u>" and that there is now due to plaintiff from defendant, after allowing to it all just credits, etc., the sum of $4,250.

To the declaration defendant filed a plea of the general issue, accompanied with an affidavit of merits by its president, and with a written demand for a jury trial. On October 15, 1931, defendant, by leave of court, filed an additional plea, accompanied with an amended affidavit of merits by its president. In the plea it is alleged:

interest thereon;" that plaintiff, in consideration thereof, on November 2, 1929, paid to defendant the sum of $4,000 and purchased from it the bonds; that to evidence the agreement defendant reduced it to writing; and that "as an inducement to plaintiff to purchase said bonds," defendant then and there delivered to plaintiff the following writing:

"November 2, 1929.

Rose Kimon,
Chicago, Ill.
Dear Madam:

This is to acknowledge that we have this day sold you $4,000, par value, First National Company, Collateral Trust, First Mortgage, Series 'O' Real Estate 5-1/2% Gold Bonds, in denomination of $1,000 each, numbered 4393-4396-4397 and 4800.

Should you desire to resell these bonds to us, we hereby agree to repurchase same at maturity at par, or $4,000, and accrued interest.

Yours very truly,
(Signed) S. M. Blumenheim,
Secretary."

That the bonds matured on July 15, 1930; that on that day plaintiff presented them to defendant and demanded that it repurchase them and pay to plaintiff the sum of $4,000 and the accrued interest; that defendant refused to repurchase the bonds and, although plaintiff has made repeated demands subsequent to July 15, 1930, upon it to repurchase them "in accordance with said agreement," yet defendant has not paid said sum of $4,000 and accrued interest, or any part thereof, to plaintiff, and refuses so to do; to plaintiff's damage, etc.

Accompanying the declaration, and on the reverse side of the printed form of the common counts, is "plaintiff's affidavit of amount due," sworn to by Thomas G. Kennedy on September 4, 1930, in substance that plaintiff's demand is for the sum of $4,820, "due and owing from defendant to plaintiff under its written agreement dated November 2, 1929;" and that there is now due to plaintiff from defendant, after allowing to it all just credits, etc., the sum of $4,820.

To the declaration defendant filed a plea of the general issue, accompanied with an affidavit of merits by its president, and with a written demand for a jury trial. On October 18, 1931, defendant, by leave of court, filed an additional plea, accompanied with an amended affidavit of merits by its president. In the plea it is alleged:

That defendant is a national bank, organized under the National Banking Laws of the United States; that "neither its charter nor the said law gives to defendant any power or authority whatever to guarantee payment of the indebtedness of any other person, firm or corporation, or to repurchase bonds at maturity, but requires that defendant in buying and selling investment securities shall do so without recourse;" and that the "supposed guaranty or repurchase agreement of the said B. M. Blankenheim, Cashier, as set forth in plaintiff's declaration, is ultra vires and void."

In the amended affidavit of merits, filed with the additional plea, it is stated:

That there is not owing to plaintiff from defendant the sum of $4,250, or any other sum; that the supposed agreement set forth in the declaration "is not the agreement of defendant;" that defendant never authorized or empowered anyone to execute the same; that defendant is a corporation organized under the Banking Laws of the United States; that under the provisions of said laws defendant "had no power or authority to enter into said supposed agreement mentioned in plaintiff's declaration;" and that "such agreement is ultra vires and void."

To the additional plea plaintiff filed a replication in which she alleged:

"That if defendant by its laws was prohibited from buying and selling the securities set forth and described in plaintiff's declaration and was not authorized by the National banking laws of the United States to enter into the agreement with plaintiff to receive her money, then it ought to return the moneys thus wrongfully received by it from plaintiff, together with interest thereon at the legal rate, - plaintiff hereby offering and tendering to return the securities purchased on the alleged illegal agreement."

On October 26, 1931, by leave of court, plaintiff filed an additional count in which, after mentioning the execution and delivery by defendant of the repurchase agreement of November 2, 1929, etc., it is alleged that she then and there paid to defendant for said bonds the sum of $4,004.47, and received the bonds from it; that when they matured, viz., July 15, 1930, she presented them to defendant and "demanded that it repurchase said bonds, but that defendant refused and still refuses so to do;" that defendant "now claims that said agreement was prohibited by the National Banking Act and that it had no right to execute the same;" that by reason thereof "plaintiff tenders said bonds in open court and demands the return of the consideration paid, plus accrued interest thereon from

That defendant is a national bank, organized under the National Banking Laws of the United States; that "neither its charter nor the said law given to defendant any power or authority whatever to guarantee payment of the indebtedness of any other person, firm or corporation, or to repurchase bonds at maturity, but requires that defendant in buying and selling investment securities shall do so without recourse;" and that the "supposed guaranty or repurchase agreement of the said H. M. Blankenship, Cashier, as set forth in plaintiff's declaration, is ultra vires and void."

In the amended affidavit of merits, filed with the additional plea, it is stated:

That there is not owing to plaintiff from defendant the sum of $4,250, or any other sum; that the supposed agreement set forth in the declaration "is not the agreement of defendant;" that defendant never authorized or empowered anyone to execute the same; that defendant is a corporation organized under the Banking Laws of the United States; that under the provisions of said laws defendant "had no power or authority to enter into said supposed agreement mentioned in plaintiff's declaration;" and that "such agreement is ultra vires and void."

To the additional plea plaintiff filed a replication in which she alleged:

"That if defendant by its laws was prohibited from buying and selling the securities set forth and described in plaintiff's declaration and was not authorized by the National banking laws of the United States to enter into the agreement with plaintiff to receive her money, then it ought to return the money thus wrongfully received by it from plaintiff, together with interest thereon at the legal rate, - plaintiff hereby offering and tendering to return the securities purchased on the alleged illegal agreement."

On October 26, 1931, by leave of court, plaintiff filed an additional count in which, after recounting the execution and delivery by defendant of the repurchase agreement of November 2, 1929, etc., it is alleged that she then and there paid to defendant for said bonds the sum of $4,004.47, and received the bonds from it; that when they matured, viz., July 15, 1930, she presented them to defendant and "demanded that it repurchase said bonds, but that defendant refused and still refuses so to do;" that defendant "now claims that said agreement was prohibited by the National Banking Act and that it had no right to execute the same;" that by reason thereof "plaintiff tenders said bonds in open court and demands the return of the consideration paid, plus accrued interest thereon from

the date of said sale;" and that it is defendant's duty to repay the same to her, but that after repeated demands defendant still refuses so to do; to plaintiff's damage, etc. Accompanying the additional count is plaintiff's affidavit in which she states "that the nature of her claim is for moneys had and received by defendant from plaintiff, as is more fully set out in said additional count;" and that there is due to her from defendant, after allowing all its just deductions, etc., the sum of $4,004.47, plus interest, etc. To the additional count defendant filed a general demurrer, but on November 5, 1931, the court overruled it.

On November 14, 1931, to the additional count, defendant filed a plea of the general issue and two other pleas. In the second plea it alleged that neither its charter nor the National Banking Law give to it any power or authority in selling investment securities to enter into an agreement to repurchase the same at a subsequent date, but requires that such securities be sold "without recourse," and that the supposed repurchase agreement mentioned is "ultra vires and void." In the third plea there are similar allegations and the additional allegation that "the only benefit" received by defendant for the execution of said agreement "was the payment to it of one-half per cent of the face value of the bonds mentioned in said agreement, or twenty ($20) dollars." Accompanying the pleas is an affidavit of merits, stating inter alia that under the provisions of the banking laws of the United States defendant "had no power or authority to enter into the agreement mentioned in plaintiff's declaration; that such agreement is ultra vires and void; and that the only benefit received by defendant an account of said contract was the sum of twenty ($20) dollars, paid as the consideration for the execution of the same."

In plaintiff's replication to the third plea she alleged

the date of said sale;" and that it is defendant's duty to repay the sums to her, but that after repeated demands defendant still refuses so to do; to plaintiff's damage, etc. Accompanying the additional count is plaintiff's affidavit in which she states "that the nature of her claim is for moneys had and received by defendant from plaintiff, as is more fully set out in said additional count;" and that there is due to her from defendant, after allowing all its just deductions, etc., the sum of $4,000.47, plus interest, etc. To the additional count defendant filed a general demurrer, but on November 8, 1931, the court overruled it.

On November 14, 1931, to the additional count, defendant filed a plea of the general issue and two other pleas. In the second plea it alleged that neither its charter nor the National Banking Law give to it any power or authority in making investment securities to enter into an agreement to repurchase the same at a subsequent date, but requires that such securities be sold "without recourse," and that the supposed repurchase agreement mentioned in "nulla vires and void." In the third plea there are similar allegations and the additional allegation that "the only ben fit" received by defendant for the execution of said agreement "was the payment to it of one-half per cent of the face value of the bonds mentioned in said agreement, or twenty ($20) dollars." Accompanying the plea is an affidavit of merits, stating inter alia that under the provisions of the banking laws of the United States defendant "had no power or authority to enter into the agreement mentioned in plaintiff's declaration; that such agreement is nulla vires and void; and that the only benefit received by defendant on account of said contract was the sum of twenty ($20) dollars, paid as the consideration for the execution of the same."

In plaintiff's replication to the third plea she alleged

that "if defendant was by said National Banking Laws prohibited from entering into the agreement with plaintiff to receive her money, then it ought to return the money thus wrongfully received by it; that the benefits received by defendant from plaintiff were not the sum of $20, as alleged in said third plea to the additional count, but that it received the entire amount from plaintiff as set forth in said additional count; and that defendant ought, therefore, to return the entire consideration received by it; and plaintiff hereby offers and tenders to return the securities purchased on the alleged illegal agreement."

On the trial plaintiff testified in her own behalf and she called as a witness for her Dr. Leo Awotin, a physician and surgeon practicing in Chicago. She also introduced in evidence, in addition to certain other writings, the repurchase agreement and the four bonds referred to in the declaration. For defendant Daniel M. Healy, its president, testified, and he gave further testimony when called by plaintiff in rebuttal. Certain other writings were offered by defendant and received in evidence. At the conclusion of plaintiff's evidence in chief, and again at the close of all the evidence, defendant moved for a directed verdict in its favor, but the motions severally were denied. While plaintiff was on the stand, her attorney, in her behalf, and with her consent, formally tendered the four bonds to defendant "if defendant will pay back the four thousand and odd dollars paid to it for them." A part of plaintiff's testimony is in substance as follows:

My occupation is that of housekeeper for Dr. Awotin. I was at the offices of defendant bank in Chicago on November 1st and 2nd, 1929, and Dr. Awotin was with me. We had conversations with Mr. Blankenheim, cashier of the bank. He said that the bank had bonds for sale, First National Company bonds, and that they "are 100 per cent good, safe and short term bonds." I told him "I don't want to buy those bonds as I don't know anything about them, how good or how bad they are." Blankenheim then asked: "Would you buy the bonds from us if we agreed to repurchase them from you at

that "if defendant was by said National Banking Law prohibited from entering into the agreement with plaintiff to receive her money, then it ought to return the money thus wrongfully received by it; that the benefits received by defendant from plaintiff were not the sum of $50, as alleged in said third plea to the additional count, but that it received the entire amount from plaintiff as set forth in said additional count; and that defendant ought, therefore, to return the entire consideration received by it; and plaintiff hereby offers and tenders to return the securities purchased on the alleged illegal agreement."

On the trial plaintiff testified in her own behalf and she called as a witness for her Mr. Leo Swotin, a physician and surgeon practicing in Chicago. He also introduced in evidence, in addition to certain other writings, the repurchase agreement and the four bonds referred to in the declaration. For defendant Daniel K. Hely, its president, testified, and he gave further testimony when called by plaintiff in rebuttal. Certain other writings were offered by defendant and received in evidence. At the conclusion of plaintiff's evidence in chief, and again at the close of all the evidence, defendant moved for a directed verdict in its favor, but the motions severally were denied. While plaintiff was on the stand, her attorney, in her behalf, and with her consent, formally tendered the four bonds to defendant "if defendant will pay back the four thousand and odd dollars paid to it for them." A part of plaintiff's testimony is in substance as follows:

My occupation is that of housekeeper for Mr. Swotin. I was at the offices of defendant bank in Chicago on November 1st and 2nd, 1929, and Dr. Swotin was with me. We had conversations with Mr. Blankenhorn, cashier of the bank. He said that the bank had bonds for sale, First National Company bonds, and that they "are 100 per cent good, safe and short term bonds." I told him "I don't want to buy these bonds as I don't know anything about them, how good or how bad they are." Blankenhorn then asked: "would you buy the bonds from us if we agreed to repurchase them from you at

maturity (July 15, 1930)?" And I "asked what were the terms?" He replied "If you buy these bonds from us now and pay 98 per one hundred down, we will promise and agree to repurchase them from you at par value." Then I said: "I want a contract; will you please write it down?" Whereupon Blankenheim said: "If you want us to write that in a contract, you will have to pay a half cent more for making the contract." I replied: "I will pay the half cent more for you to make the contract." And "I paid 98-1/2 per hundred; and I accepted the contract; and I paid altogether for the bonds $4,004.47." After I had received the four bonds, Blankenheim said: "Now, you will have nothing to worry about on these bonds; as soon as they are due you will get your cash." The four bonds now shown me are the same bonds I received at that time. Thereafter I collected on the coupons which became due on January 15, 1930. I didn't collect on the coupons which matured on July 15, 1930. I never received any other money on the bonds. When the bonds matured, July 15, 1930, I, in company with Dr. Awotin, again saw Blankenheim at the bank. I offered him the four bonds, but he said: "I can't buy your bonds because you will have to see Mr. Healy, president of the bank." A week or so later, Dr. Awotin and I saw Mr. Healy at his office at 111 West Washington street, Chicago; I offered the bonds to him; but he said that the bank "hadn't any money to purchase those bonds." And that "as soon as he got the money he would purchase them," and that the bank had become "merged" with another bank.

Dr. Awotin in his testimony corroborated plaintiff as to the purport of the conversations had with Blankenheim on November 1st and 2nd, 1929, and as to the execution and delivery to her by the bank of the repurchase agreement and the delivery of the four bonds to her. He further testified in part:

"After these bonds were delivered to Miss Kimen I was at the Atlas Bank with her several times. * * On July 15, 1930, I was present with her at the West Side National Bank. That is the bank that consolidated with the Atlas Bank. We there saw Blankenheim. Miss Kimen said: 'Here are the bonds and I want you to repurchase them.' He said: 'I can't repurchase them; you will have to see Mr. Healy first about the bonds; he has something to say to you.' About a week afterwards we saw Healy and had a conversation with him. Miss Kimen said: 'I have brought these bonds to you to repurchase; Blankenheim told me to see you about them.' Healy said: 'I have no money at the present time to repurchase them; the bank is merged; as soon as I get the money I will repurchase the bonds from you; * * I authorized the cashier to sell you these bonds and make with you a written contract; I am liable for the bonds, but now there is no money on hand.' Healy said to me that the Atlas Bank merged with the West Side National Bank; that the bank's assets are tied up * * and that she would have to wait for a few months."

Defendant's witness, Healy, its president, testified in part substantially as follows:

That Blankenheim was not an officer of the Atlas Bank (defendant), or an employee of it or in any way connected with it, on July 15, 1930; that the Atlas Bank went out of business on June

maturity (July 15, 1930)?" And I "asked what were the terms?" He replied "If you buy these bonds from us now and pay 98 per one hundred down, we will promise and agree to repurchase them from you at par value." Then I said: "I want a contract; will you please write it down?" Whereupon Blankenheim said: "If you want us to write that in a contract, you will have to pay a half cent more for making the contract." I replied: "I will pay the half cent more for you to make the contract." And "I paid 98-1/2 per hundred; and I accepted the contract; and I paid altogether for the bonds $4,004.47." After I had received the four bonds, Blankenheim said: "Now, you will have nothing to worry about on these bonds; as soon as they are due you will get your cash." The four bonds now shown me are the same bonds I received at that time. Thereafter I collected on the coupons which became due on January 15, 1930. I didn't collect on the coupons which matured on July 15, 1930. I never received any other money on the bonds, when the bonds matured, July 15, 1930, I, in company with Mr. Austin, again saw Blankenheim at the bank. I offered him the four bonds, but he said: "I can't buy your bonds because you will have to see Mr. Healy, president of the bank." A week or so later, Mr. Austin and I saw Mr. Healy at his office at 111 West Washington street, Chicago; I offered the bonds to him; but he said that the bank "hadn't any money to purchase those bonds." And that "as soon as he got the money he could purchase them," and that the bank had become "merged" with another bank.

Mr. Austin in his testimony corroborated Plaintiff as to the purport of the conversations had with Blankenheim on November 1st and 2nd, 1929, and as to the execution and delivery to her by the bank of the repurchase agreement and the delivery of the four bonds to her. He further testified in part:

"After these bonds were delivered to Miss Kimen I was at the Atlas Bank with her several times. * * On July 15, 1930, I was present with her at the West Side National Bank. That is the bank that consolidated with the Atlas Bank. We there saw Blankenheim, Miss Kimen said: 'Here are the bonds and I want you to repurchase them.' He said: 'I can't repurchase them; you will have to see Mr. Healy first about the bonds; he has nothing to say to you.' About a week afterwards we saw Healy and had a conversation with him. Miss Kimen said: 'I have brought these bonds back to you to repurchase; Blankenheim told me to see you about them.' Healy said: 'I have no money at the present time to repurchase them; the bank is merged; as soon as I get the money I will repurchase the bonds from you;' I authorized the cashier to sell you these bonds. We made with you a written contract; I am liable for the bonds, but now there is no money on hand.' Healy said to me that the bank's assets are tied up in the Atlas National Bank; that the bank's assets are tied up and that she would have to wait for a few months."

Defendant's witness, Healy, the president, testified in part substantially as follows:

That Blankenheim was not an officer of the Atlas Bank (defendant), or an employee of it or in any way connected with it, on July 15, 1930; that the Atlas Bank went out of business on June

21, 1930, and was closed and is still closed; that its assets were turned over to the West Side National Bank upon the latter's assumption of its deposit liabilities; that it is not a fact that the Atlas Bank "merged" with the West Side Bank, nor did they "consolidate," that he (the witness) never held any office in the West Side Bank, or had anything to do with its business affairs; that up to June 21, 1930, Blankenheim was the cashier of the Atlas Bank and the active man in its affairs; that on that day he severed his official connection with it, and when its assets were turned over to the West Side Bank he was made an assistant cashier of the latter bank; that when the Atlas Bank was closed he (the witness) procured the resignations of all of its officers, and he has been and is now acting as the liquidator of the bank; that the "Comptroller did not close the bank;" that before the bank ceased doing business he (the witness) had no active management in the affairs of the bank; that he never knew until shortly after July 15, 1930, when Dr. Awotin and Miss Kimen saw Blankenheim and demanded payment of the amounts of certain bonds which they had purchased of the bank, that the bank had sold bonds with an agreement to repurchase them; and that Dr. Awotin and Miss Kimen are the only two having claims against the bank based upon such repurchase agreements.

That about a week after July 15, 1930, Dr. Awotin and Miss Kimen had a conversation with him at his office; that at that time he did not state that, as president of defendant bank or otherwise, he had authorized the execution of the repurchase agreement sued upon, or that he or the bank were liable upon the agreement to pay back the amount of the bonds; that on the contrary he stated to them that he "could not recognize the agreement because it was against the law;" that "Blankenheim never had any business signing it," that if he paid the money demanded he "would be violating the law and might become personally liable" and that if they wanted to make a trade with him for other bonds he would personally give them some of his own other bonds for the bonds in question; that subsequently negotiations were had between him (the witness) and Dr. Awotin concerning proposed trades of bonds, but finally Dr. Awotin sent word to him that he did not want to make any of the proposed trades; that at the time of said conversation of July 15, 1930, he believed "that the bank was not liable on that agreement;" that he then personally owned some of the bonds of the same issue; that although those bonds were then in default he "still thought they were good;" and that he has since received money on those that he owns.

In view of the pleadings, the repurchase agreement sued upon and the evidence, including the testimony of plaintiff, we are of the opinion that the trial court erred in not granting defendant's motions to instruct the jury to return a verdict in its favor and in entering the judgment in question. The respective contentions of opposing counsel, here made, are substantially the same as some of the contentions made in the Awotin case, No. 37307, in which it appears that an action was brought upon a similar

21, 1930, and was closed and is still closed; that the assets were turned over to the West Side National Bank upon the latter's assumption of its deposit liabilities; that it is not a fact that the Atlas Bank "merged" with the West Side Bank, nor did they "consolidate," that he (the witness) never held any office in the West Side bank, or had anything to do with its business affairs; that up to June 21, 1930, Blankenhorn was the cashier of the Atlas Bank and the active man in its affairs; that on that day he severed his official connection with it, and upon its assets were turned over to the West Side Bank he was made an assistant cashier of the latter bank; that when the Atlas Bank was closed he (the witness) procured the signatures of all of its officers, and he has been and is now acting as the liquidator of the bank; that the "comptroller did not close the bank;" that before the bank ceased doing business he (the witness) had no active management in the affairs of the bank; that he never knew until shortly after July 15, 1930, when Mr. Austin and Miss Kimen saw Blankenhorn and demanded payment of the amounts or certain bonds which they had purchased of the bank, that the bank had sold bonds with no agreement to repurchase as there; and that Mr. Austin and Miss Kimen are the only two having claims against the bank based upon such repurchase agreements.

That about a week after July 15, 1930, Mr. Austin and Miss Kimen had a conversation with him "in his office; that if that time he did not state that, as president of defendant bank or otherwise, he had authorized the execution of the repurchase agreement sued upon, or that he or the bank were liable upon the agreement to pay back the amount of the bonds; that on the contrary he stated to them that he "could not recognize the agreement because it was against the law;" that "Blankenhorn never had any business signing it;" that if he paid the money demanded he "would be violating the law and might become personally liable;" and that if they wanted to make a trade with him for other bonds he would personally give them some of his own bonds for the bonds in question; that subsequently negotiations were had between him (the witness) and Mr. Austin concerning proposed trades of bonds, but finally Mr. Austin came back to him that he did not want to make any of the proposed trades; that on July 21, 1930, the date of the execution of suit, he believed that the bank was not liable on that agreement; that he then personally owned some of the bonds of the same issue; that although those bonds were then in default he "still thought they were good;" that he has since received money on them as that he owns.

In view of the pleadings, the purchase agreement sued upon and the evidence, including the testimony of plaintiff, we are of the opinion that the trial court erred in not granting defendant's motions to instruct the jury to return a verdict in its favor and in entering the judgment in question. The respective contentions of opposing counsel are made, are substantially the same as some of the contentions made in the Austin case, No. 17607, in which it appears that an action was brought upon a similar

agreement and in which case an opinion has this day been filed. For the reasons stated in that opinion, and particularly because of the decisions and holdings in the recently adjudicated cases of Knass v. Madison and Kedzie State Bank, 354 Ill. 554, and Texas & Pacific Railway Co. v. Pottorff, 54 U. S. Sup. Ct. Rep., No. 7, pp. 416-20 (discussed in our opinion in the Awotin case) it seems clear to us that the agreement herein sued upon is beyond the powers of defendant bank to make and is void upon the grounds of public policy, and that, therefore, it cannot be enforced by any court and the present judgment should be reversed without a remandment of the cause. Accordingly, the judgment of the circuit court of Cook County, entered against defendant on January 30, 1932, is reversed.

REVERSED.

Sullivan, P. J., and Scanlan, J., concur.

agreement and in which case an opinion by this day been filed. For the reasons stated in that opinion, and particularly because of the decisions and holdings in the recently adjudicated cases of Ennis v. Hudgins and Florida State Bank, 154 Ill. 554, and Texas & Pacific Railway Co. v. Bostwick, 54 U. S. Sup. Ct. Rep., No. 7, pp. 410-20 (discussed in our opinion in the Austin case) it seems clear to us that the agreement herein sued upon is beyond the powers of defendant bank to make and is void upon the grounds of public policy, and that, therefore, it cannot be enforced by any court and the present judgment should be reversed without a remandment of the cause. Accordingly, the judgment of the circuit court of Cook County, entered against defendant on January 30, 1933, is reversed.

REV DEL.

Sullivan, P. J., and Scanlan, J., concur.

36947

JOSEPHINE KASTRO, Administratrix of the Estate of JOHN KASTRO, Deceased,
Defendant in Error,

v.

C. J. McGUIRE and HARRY W. NORDENDALE,
Defendants.

HARRY W. NORDENDALE,
Plaintiff in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

275 I.A. 638

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John Kastro, plaintiff, sued C. J. McGuire, Harry W. Nordendale and Chicago Industrial Construction Company, a corporation, in case. There was a trial before the court with a jury and at the conclusion of plaintiff's evidence defendant Chicago Industrial Construction Company was dismissed from the case. The jury returned a verdict finding defendants McGuire and Nordendale guilty and assessing plaintiff's damages in the sum of $2,000. Defendant Nordendale has sued out this writ of error to reverse a judgment entered upon the verdict. After the judgment was entered John Kastro, plaintiff, died, and, upon motion, Josephine Kastro, administratrix of his estate, has been substituted as defendant in error.

The declaration consists of four counts. The first alleges that on March 1, 1929, plaintiff was in possession of the premises known as 2100 Fulton street, in Chicago, by virtue of a tenancy that existed between plaintiff and the owner of the premises; that he was conducting a restaurant business in the premises and owned and controlled personal property used therein and enjoyed a lucrative and profitable business; that in the

30847

JOSEPHINE KANTRO, administratrix
of the Estate of JOHN KANTRO,
Deceased,
Defendant in Error,

v.

C. J. McGUIRE and HENRY W.
MORDENDALE,
Defendants.

HENRY W. MORDENDALE,
Plaintiff in Error,

v.

C. J. McGUIRE and HENRY W.
MORDENDALE,
Defendants.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

275 I.A. 638

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT:

John Kantro, plaintiff, sued C. J. McGuire, Henry W. Mordendale and Chicago Industrial Construction Company, a corporation, in case. There was a trial before the court with a jury and at the conclusion of plaintiff's evidence defendant Chicago Industrial Construction Company was dismissed from the case. The jury returned a verdict finding defendants McGuire and Mordendale guilty and assessing plaintiff's damages in the sum of $2,000. Defendant Mordendale has sued out this writ of error to reverse a judgment entered upon the verdict. After the judgment was entered John Kantro, plaintiff, died, and, upon motion, Josephine Kantro, administratrix of his estate, has been substituted as defendant in error.

The declaration consists of four counts. The first alleges that on March 1, 1924, plaintiff was in possession of the premises known as 2100 Milton street, in Chicago, by virtue of a tenancy that existed between plaintiff and the owner of the premises; that he was conducting a restaurant business in the premises and owned and controlled personal property used therein

early part of February, 1929, the owners of the premises sold their interest to defendants or some one or more of them, subject to the right of plaintiff to the possession of the premises; that defendants knew that plaintiff was entitled to the peaceful possession of the premises and that defendant Nordendale, acting with the knowledge, acquiescence and consent of the other defendants, recognized the tenancy of plaintiff, and on March 2, 1929, received and accepted rent for the premises from plaintiff, and that it was the duty of defendants to not interfere with the peaceful possession of the premises by plaintiff or to wilfully or wantonly injure his property or business; that defendants, on April 6, 1929, forcibly entered the said premises and by force destroyed the personal property of plaintiff and wrecked and tore down the building wherein said premises were located, thereby destroying plaintiff's property and his business. The second count alleges that plaintiff entered into an oral agreement with Jennie McGinnis Van Wyck, the owner of the premises, whereby she leased and demised to plaintiff a certain store therein for the purpose of operating a restaurant and that plaintiff installed various fixtures therein and was engaged in the operation of a restaurant business from which he enjoyed a lucrative income, which restaurant, fixtures and good will, on April 6, 1929, had a fair, usual and reasonable market value of $10,000; that the first part of February, 1929, defendant Nordendale purchased the premises from the said Van Wyck, subject to the rights of plaintiff therein, and said defendant then and there entered into an agreement or arrangement with defendants McGuire and Chicago Industrial Construction Company and each of them for the razing or destroying of the building and the construction of a new building, against the rights of plaintiff, and that the defendants knew, or by the exercise

early part of February, 1929, the owners of the premises said their interest to defendants or some one or more of them, subject to the right of plaintiff to the possession of the premises; that defendants knew that plaintiff was entitled to the peaceful possession of the premises and that Clement Mordenhale, acting with the knowledge, acquiescence and consent of the other defendants, recognized the tenancy of plaintiff, and on March 2, 1929, received and accepted rent for the premises from plaintiff, and that it was the duty of defendants to not interfere with the peaceful possession of the premises by plaintiff or to fill, or wrongfully injure his property or business; that defendants, on April 6, 1929, forcibly entered the said premises and by force drove the peaceful property of plaintiff and evicted him from the building wherein said premises were located, thereby injuring plaintiff's property and his business. The second count alleges that plaintiff entered into an oral agreement with Jennie M. Van Dyck, the owner of the premises, whereby she leased and demised to plaintiff a certain store therein for the purpose of operating a restaurant and that plaintiff installed various fixtures, therein and engaged in the operation of a restaurant business from which he enjoyed a lucrative income, which restaurant, fixtures, and good will, on April 6, 1929, had a fair, usual and reasonable market value of $10,000; that the first part of February, 1929, Clement Mordenhale purchased the premises from the said Van Dyck, subject to the rights of plaintiff therein, and said defendant then and there entered into an agreement or arrangement with defendants Schutte and Otto, Industrial Construction Company and each of them for the renting or destroying of the building and the construction of a new building, against the rights of plaintiff, and that the defendants knew, or by the exercise

of ordinary care on their part could have known, that plaintiff was entitled to the peaceful possession and use and occupation of the premises, but that said defendants, acting with the knowledge, acquiescence and consent of one another, and contrary to the rights of plaintiff, wilfully, wantonly and maliciously, on April 6, 1929, wrecked and razed the building, thereby totally destroying plaintiff's personal property and his business, etc. The third count alleges, inter alia, that on February 1, 1929, defendant Nordendale purchased the fee to the building in question for the purpose of constructing a new building thereon, subject to the rights of plaintiff, and that said defendant made divers offers to plaintiff for the purchase of the restaurant and the right to the possession of the premises, which were wholly inadequate and which plaintiff refused to accept, and that said defendant conspired with the other two defendants to deprive plaintiff of his business and his personal property and his right to the peaceful possession of the store, and that in pursuance of the said conspiracy, they, on April 6, 1929, maliciously, wilfully and wantonly, during the absence of plaintiff and after business hours, razed and wrecked the building, thereby destroying all of plaintiff's personal property and depriving him of his right to the peaceful possession of the premises, etc. The fourth count is in substance like the third. Defendant Nordendale filed the plea of the general issue and two special pleas. The first special plea denied that plaintiff was a tenant of his, or that he recognized the alleged tenancy of plaintiff. The second special plea denied that defendant Nordendale "managed, operated, maintained or controlled any instrumentality brought to bear upon the alleged property of the plaintiff." No point is made as to the pleadings.

of ordinary care on their part could have known, that plaintiff was entitled to the peaceful possession and use and occupation of the premises, but that said defendants, acting with the knowledge, acquiescence and consent of one another, and contrary to the rights of plaintiff, wilfully, wantonly and maliciously, on April 6, 1929, wrecked and razed the building, thereby totally destroying plaintiff's personal property and his business, etc. The third count alleges, inter alia, that on February 1, 1929, defendant Mordendale purchased the fee to the building in question for the purpose of constructing a new building thereon, subject to the rights of plaintiff, and that said defendant made divers offers to plaintiff for the purchase of the tenancement and the right to the possession of the premises, which were absolutely inadequate and which plaintiff refused to accept, and that said defendant conspired with the other two defendants to deprive plaintiff of his business and his personal property and his right to the peaceful possession of the store, and that in pursuance of the said conspiracy, they, on April 6, 1929, maliciously, wilfully and wantonly, during the absence of plaintiff and after business hours, razed and wrecked the building, thereby destroying all of plaintiff's personal property and depriving him of his right to the peaceful possession of the premises, etc. The fourth count is in substance like the third. Defendant Mordendale filed the plea of the general issue and two special pleas. The first special plea denied that plaintiff was a tenant of his, or that he recognized the alleged tenancy of plaintiff. The second special plea stated that defendant Mordendale "managed, operated, maintained or controlled any instrumentality brought to bear upon the alleged property of the plaintiff." No point is made as to the pleadings.

Plaintiff in error contends that the trial court erred in permitting plaintiff and one of his witnesses to testify to alleged conversations between plaintiff, defendants Nordendale and McGuire, and the president of the Chicago Industrial Construction Company. Plaintiff and his witness, Jackson, testified, in substance, that in these conversations defendant Nordendale first offered plaintiff $2,500 if the latter would give up his right to occupy the premises, and that upon the refusal of plaintiff to accept the offer Nordendale raised the offer to $3,500; that plaintiff refused to accept this offer and insisted that he was entitled to $10,000; that plaintiff then reduced the amount to $7,500, and finally to $6,500, and that during the conversations defendants threatened they would wreck the premises, anyhow, if plaintiff did not accept defendant Nordendale's offer and vacate them. Defendants' evidence was to the effect that no such conversations ever took place and that the testimony of plaintiff and Jackson in reference thereto was false, in toto. Defendant Nordendale here contends that plaintiffs' aforesaid evidence simply tended to show a proposition made by Nordendale to plaintiff for the purpose of effecting a compromise and that such evidence was therefore incompetent and was highly prejudicial to defendants. After a careful examination of the record we are not satisfied that defendants preserved, by apt objections, the point they now made. Moreover, part, at least, of the testimony was competent, (a) as tending to prove the alleged conspiracy of defendants, and (b) as evidence bearing upon the question of malice.

Plaintiff in error strenuously argues that the verdict is clearly contrary to the manifest weight of the evidence. In passing upon this contention we have read the bill of exceptions, and after a careful consideration of the evidence we have reached the conclusion that the instant contention is a meritorious one. As this case may

Plaintiff contends that the trial court erred in permitting plaintiff and one of his witnesses to testify to alleged conversations between plaintiff, defendants Mordendale and McGuire, and the president of the Chicago Industrial Construction Company. Plaintiff and his witness, Jackson, testified, in substance, that in these conversations defendant Mordendale first offered plaintiff $2,500 if the latter would give up his rights to occupy the premises, and that upon the refusal of plaintiff to accept the offer Mordendale raised the offer to $3,000; that plaintiff refused to accept this offer and insisted that he was entitled to $10,000; that plaintiff then reduced the amount to $7,500, and finally to $6,500, and that during the conversations defendants threatened they would wreck the premises, anyhow, if plaintiff did not accept defendant Mordendale's offer and vacate them. Defendants' evidence was to the effect that no such conversations ever took place and that the testimony of plaintiff and Jackson in reference thereto was false, in toto. Defendant Mordendale here contends that plaintiff's rebuttal evidence simply tended to show a proposition made by Mordendale to plaintiff for the purpose of effecting a compromise and that such evidence was therefore incompetent and was highly prejudicial to defendants. After a careful examination of the record we are not satisfied that defendants preserved, by apt objections, the point xxxx now made. Moreover, part, at least, of the testimony was competent, (a) as tending to prove the alleged conspiracy of defendants, and (b) as evidence bearing upon the question of malice.

Plaintiff's argument in error that the verdict is clearly contrary to the manifest weight of the evidence. In passing upon this contention we have read the bill of exceptions, and after a careful consideration of the evidence we have reached the conclusion that the instant contention is a meritorious one. In this case may

be tried again we purposely refrain from analyzing and commenting upon certain facts and circumstances that have forced us to this conclusion.

As the judgment against defendants McGuire and Nordendale is a unit, the judgment as to both defendants must be reversed. The judgment of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Sullivan, P. J., and Gridley, J., concur.

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As the judgment against defendants Montiro and Mordomatis is a unit, the judgment as to both defendants must be reversed. The judgment of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

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37027

JAMES J. BROWN,
Appellant,

v.

LEATHEM SMITH-PUTNAM NAVIGATION COMPANY, a corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

275 I.A. 638[4]

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action of the fourth class in the Municipal court of Chicago for damages alleged to have been sustained to plaintiff's boat, the "Alberta," which was "rammed or struck" by defendant's barge, "Material Service." Plaintiff sued to recover $204.20. The case was heard by the court, without a jury, and there was a finding and judgment in favor of defendant. This appeal followed.

No question arises upon the pleadings. No propositions of law or fact were submitted to the trial court.

Plaintiff contends that "the finding and judgment are contrary to the manifest weight of the evidence," and that defendant's negligence was the proximate cause of the accident.

At the time of the injury to plaintiff's boat the city of Chicago was engaged in building the foundations of a new bridge over the Chicago river at Halsted street and had constructed a temporary bridge just east of the said foundations. A tug, or scow, and derrick were "standing" or "laying" in the draw of the bridge, thereby obstructing the passage of boats through the draw. "They were delivering material supplies or something." The Alberta, a 47-foot power cruiser, was moored at the Keith Boat & Engine Company dock, located between 205 and 300 feet west of the

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At the time of the injury to plaintiff's boat the city of Chicago was engaged in building the foundations of a new bridge over the Chicago river at Halsted street and had constructed a temporary bridge just east of the said foundations. A tug, or scow, and derrick were "standing" or "laying" in the draw of the bridge, thereby obstructing the passage of boats through the draw. "They were delivering material supplies or something." The Alberta, a 47-foot power cruiser, was moored at the Keith Boat & Engine Company dock, located between 205 and 300 feet west of the

foundations of the new bridge. The barge Material Service, a conveyor boat built for carrying gravel, sand, coal and other materials, had a length of 240 feet, a beam of 41 feet, and moulded depth of 16 feet. Its captain, Charles D. Brown, had been a steamboat master for 25 years, "held licenses all over the Great Lakes," and had sailed the lakes for 50 years. The Material Service left Lockport, Illinois, with a 2,200-ton cargo of gravel and sand, about 11 o'clock p. m. November 14, 1932, and proceeded down the Drainage canal and the Chicago river, and about 5 o'clock a. m. November 15 had reached a point about 450 or 500 feet west of the new bridge. About 50 feet beyond that point there is a bend in the river. It is conceded that before reaching the bend the Material Service "blew one long whistle, a signal for the bend." "The purpose of the bend whistle was to locate obstructions in the channel and when we don't hear any response from that whistle we assume that it is clear and go ahead. That whistle is provided for by law." Captain Brown received no response to his signal. As his testimony is all-important in the determination of this case, we will refer to it at some length. He stated that after he received no response to his signal he proceeded, at a moderate rate of speed, until he reached about the elevator below Halsted street; that as there was no response to his signal he assumed the way was clear, that there was nothing in the draw of the bridge, and that he could go ahead; that after he came around the bend he noticed the scow in the draw of the temporary bridge, which was then about 400 feet away; that he immediately backed his vessel and reversed the engine "to take the headway off of her;" that there is no other way of taking headway off a steamer; that she has no brakes; "that dropping an anchor would do no good" as it was "no place of that kind, in trying to drop anchor before you

foundations of the new bridge. The barge, Material Service, a conveyor boat built for carrying gravel, sand, coal and other materials, had a length of 240 feet, a beam of 42 feet, and moulded depth of 16 feet. Its captain, Charles D. Brown, had been a steamboat master for 25 years, "held licenses all over the Great Lakes," and had sailed the lakes for 30 years. The Material Service left Lockport, Illinois, with a 2,200-ton cargo of gravel and sand, about 11 o'clock p. m. November 14, 1932, and proceeded down the Drainage canal and the Chicago river, and about 5 o'clock a. m. November 15 had reached a point about 650 or 800 feet west of the new bridge. About 80 feet beyond that point there is a bend in the river. It is conceded that before reaching the bend the Material Service "blew one long whistle, a signal for the bend." "The purpose of the bend whistle was to locate obstructions in the channel and when we don't hear any response from that whistle we assume that it is clear and go ahead. That whistle is provided for by law." Captain Brown received no response to his signal. As his testimony is all-important in the determination of this case, we will refer to it at some length. He stated that after he received no response to his signal he proceeded, at a moderate rate of speed, until he reached about the elevator below Halsted street; that as there was no response to his signal he assumed the way was clear, that there was nothing in the draw of the bridge, and that he could go ahead; that after he came around the bend he noticed the scow in the draw of the temporary bridge, which was then about 400 feet away; that he immediately backed his vessel and reversed the engine "to take the headway off of her;" that there is no other way of taking headway off a steamer; that she has no brakes; "that dropping an anchor would do no good" as it was "no place of that kind, in trying to drop anchor before you

had got sufficient scope of chain out to fetch you up it would not do any good, it would be damaged. That is a short turn at this bridge, and electric cables run around there, and the flow that was incoming at that time, it would not have done us any good. * * * There is two of the piers of the original or old bridge in there, and there is a temporary bridge built, and then the new -- the sub-structure of the new bridge was being built at that time, a cofferdam there. * * * There is a series of spiling driven in there on each side and right immediately under the swinging part of the temporary bridge it is filled up filled the span up to the top of the water, then at the end landing pier it is filled a full span, and the same thing applies on the north side of the river there, there is a pier built in there and it is built a full span so it shifts the river going there and creates a heavy current. * * * It shuts off, I would say, about 125 feet of that river," and leaves between these cribs "70 feet of the draw. * * * And in addition to the sheet spiling for sub-structure on the north side a sewer came out there and they had some sheet spiling driven in there which extended out possibly 8 feet or 10 and shut the river off there at that point, that is, it would create a larger current, a cross current there;" that the effect on navigation of the obstructions built out in the river "created a back current there;" that there were two of the piers of the original or old bridge in there, "and there is a temporary bridge built, and then the new;" that a part of the substructure extended out 25 feet; "then this niche that they had driven in there would make it come out there about 35 feet;" that as a rule there was a cross current; that the normal flow of the river was pretty wide there and the normal current would not run over a mile an hour; that "we used to go up through there with our vessel working half speed, when the

had got sufficient scope of chain out to tetch you up it would not do any good, it would be damaged. That is a short turn at this bridge, and electric cables run around there, and the flow that was incoming at that time, it would not have done us any good. * * * There is two of the piers of the original or old bridge in there, and there is a temporary bridge built, and then the new -- the sub-structure of the new bridge was being built at that time, a cofferdam there. * * * There is a series of spilling driven in there on each side and right immediately under the swinging part of the temporary bridge it is filled up filled the span up to the top of the water, then at the end landing pier it is filled a full span, and the same thing applies on the north side of the river there, there is a pier built in there and it is built a full span so it shuts the river going there and creates a heavy current. * * * It shuts off, I would say, about 150 feet of that river," and leaves between these cribs "70 feet of the draw. * * * And in addition to the sheet spiling for sub-structure on the north side a sewer came out there and they had some sheet spiling driven in there which extended out possibly 8 feet or 10 and shut the river off there at that point, that is, it would create a larger current, a cross current there;" that the effect on navigation of the obstructions built out in the river "created a back current there;" that there were two of the piers of the original or old bridge in there, "and there is a temporary bridge built, and then the new;" that a part of the substructure extended out 25 feet; "then this whole that they had driven in there would make it come out there about 35 feet;" that on a tide there was a cross current; that the normal flow of the river was pretty wide there and the normal current would not run over a mile an hour; that "we need to go up through there with our vessel working half speed, when the

old bridge was in, and under the conditions that exist there now we have to work her full speed; we can get no greater air pressure off the engine in order to speed up, and have had all they could do to go through that hole, and there has been times you could not make it and have had to get lines out and laid there;" that at the time of the accident "there was fully a four mile current right in that hole there or better;" that the draft of the Material Service at the time of the accident was "about thirteen four or five forward, and twelve feet six aft;" that draft means the distance her hull was down in the water; that the accident happened about 5 o'clock, when it was dark; that he was on watch in the pilot house and there were two "lookouts" forward; that he was about 400 feet from the draw of the bridge when he observed that the draw was blocked by a scow, and he immediately backed the vessel full speed, which had the effect of stopping it; that there was then a possible chance for her to swing from one side of the river to the other; that the current caught her bow and set her across the river; that when you back a vessel she will not steer, and "if there is any cross current coming down to catch her it will force her over to either side of the river, the opposite side that it hits on;" that to properly control a vessel going against the current "you have to have more headway * * * just about the speed of the current;" that their bow swung across and their stern raked the side of the Alberta, moored at the dock, and they could do nothing else except back the vessel. "Q. Is there any way of controlling the course or direction of a vessel when she is in reverse, backing? A. No, sir." On cross-examination he testified that work was started on the foundationsof the bridge in July, and that the Material Service passed that point on an average of three or four times a week; that they had to back out of there

old bridge was in, and under the conditions that exist there now we have to work her full speed; we can get no greater air pressure off the engine in order to speed up, and have had all they could do to go through that hole, and there has been times you could not make it and have had to get lines out and land there;" that at the time of the accident "there was fully a four mile current right in that hole there or better;" that the draft of the Material Service at the time of the accident was "about thirteen foot or five forward, and twelve feet six aft;" that draft means the distance her hull was down in the water; that the accident happened about 8 o'clock, when it was dark; that he was on watch in the pilot house and there were two "lookouts" forward; that he was about 400 feet from the draw of the bridge when he observed that the draw was blocked by a scow, and he immediately backed the vessel full speed, which had the effect of stopping it; that there was then a possible chance for her to swing from one side of the river to the other; that the current caught her bow and set her across the river; that when you back a vessel she will not steer, and "if there is any cross current coming down to catch her it will force her over to either side of the river, the opposite side that it hits on;" that to properly control a vessel going against the current "you have to have more headway * * * just about the speed of the current;" that their bow swung across and their stern raked the side of the Alberta, moored at the dock, and they could do nothing else except back the vessel. "Q. Is there any way of controlling the course or direction of a vessel when she is in reverse, backing? A. No, sir." On cross-examination he testified that work was started on the foundations of the bridge in July, and that the Material Service passed that point on an average of three or four times a week; that they had to back out of there

about three out of five trips; that they expected they would have to back out; that they carried a search light and had two lights in order to show the entire river on each side at all times; that the light was turned on this particular bend; that in order to see the temporary structure one would have to be about abreast of the C., B. & Q. Elevator (witness here indicated upon a map or chart the point at which he could first see the temporary structure); that at that point they were going about 3 miles an hour; that if they reversed the engines when they were going three miles an hour they could not control the ship; that when they were about 450 or 500 feet from the posts of the new bridge "I blew the whistle and got no reply and I took for granted there was nothing there, and proceeded up the river;" that as soon as he got around the bend "and saw nothing there" he "sped up;" that he turned off the engines and reversed when he was probably 350 feet from the bridge; that the river is about 200 feet wide at the point where he first saw a scow at the bridge; that he immediately reversed the engines and the vessel went forward about 300 feet, "maybe a little better," within 50 feet of the scows; that in going backward the current hit her bow and set her across the river; that he knew about the currents in the draw; "Q. There was not anything unusual on that day? A. Yes, sir, each time you would go up you would hit something different. The river is not straight enough for you to see;" that "going up there, there is some scows sitting in the draw, and then there would be a derrick scow in alongside the new work that was going on, and that would shift your current. * * * I didn't know that condition was going to stay there;" that if he had had a search light turned on that point he could not have seen there was a scow there in twice that distance because of steam arising from the dock or derrick, or the derrick scow, "a little steam;" that he would say the stern was

about three out of five trips; that they expected they would have to back out; that they carried a search light and had two lights in order to show the entire river on each side at all times; that the light was turned on this particular band; that in order to see the temporary structure one would have to be about abreast of the O., B. & Q. Elevator (witness here indicated upon a map or chart the point at which he could first see the temporary structure); that at that point they were going about 3 miles an hour; that if they reversed the engines when they were going three miles an hour they could not control the ship; that when they were about 450 or 500 feet from the posts of the new bridge "I blew the whistle and got no reply and I took for granted there was nothing there, and proceeded up the river;" that as soon as he got around the bend "and saw nothing there" he "aped up;" that he turned off the engines and reversed when he was probably 350 feet from the bridge; that the river is about 200 feet wide at the point where he first saw a scow at the bridge; that he immediately reversed the engines and the vessel went forward about 300 feet, "maybe a little better," within 30 feet of the scows; that in going backward the current hit her bow and set her across the river; that he knew about the currents in the draw; "Q. There was not anything unusual on that day? A. Yes, sir, each time you would go up you would hit something different. The river is not straight enough for you to see;" that "going up there, there is some scows sitting in the draw, and then there would be a derrick scow in alongside the new work that was going on, and that would shift your current. * * * I didn't know that condition was going to stay there;" that if he had had a search light turned on that point he could not have seen there was a scow there in twice that distance because of steam arising from the dock or derrick, or the derrick scow, "a little steam;" that he would say the steam was

400 feet from the bridge when he first saw the scow; that they operate from the stern of the boat because the pilot house is on the aft end; that the bow was approximately 200 or 300 feet from the spot; that they watch for obstructions with which they may come in contact, and that is why they have lookouts forward; "I don't know whether it (the map shown him by counsel for plaintiff) is correct or not, but the river is not straight enough for you to see, there is a bend right there at that temporary Halsted street bridge (indicating on the map). * * * That temporary draw comes about that angle (indicating) a little angle in the river here, and there are two abutments of the old bridge sits here, no here, so when you come up here to this point here that obstructs that point, you got to come around this bend and get up along here in order to look up through the draw there;" that he knew that until he got to the place indicated on the map by the word "of" he could not observe what was going on at the temporary bridge; that not hearing any whistle or anything from the plant that was working there he assumed that everything was clear; that the Material Service has an unloader and is built to go underneath bridges and is not a tunnel-stern boat, but is a regular boat, "no polywog or anything like that;" that "a tunnel-stern boat is tunnels conductible to the propellers so the water can get to them, this isn't that kind of a boat;" that in all boats the propellers are above the bottom; that he did not know "if there is any difference between the rapidity with which you can reverse the engines of a tunnel stern boat. I never operated a tunnel boat, this is a regular boat, the same as all cargo boats in size, she is not a pleasure boat or anything like that. She is a freight boat." On redirect he testified that the purpose of the bend whistle was to locate obstructions in the channel and that

400 feet from the bridge when he first saw the boom; that they operate from the stern of the boat because the pilot house is on the aft end; that the bow was approximately 200 or 300 feet from the spot; that they watch for obstructions with which they may come in contact, and that is why they have lookouts forward; "I don't know whether it (the map shown him by counsel for plaintiff) is correct or not, but the river is not straight enough for you to see, there is a bend right there at that temporary bridged street bridge (indicating on the map). * * * That temporary draw comes about that angle (indicating) a little angle in the river here, and there are two abutments of the old bridge site here, so here, so when you come up here to this point here that obstructs that point, you got to come around this bend and get up along here in order to look up through the draw there;" that he knew that until he got to the place indicated on the map by the word "of" he could not observe what was going on at the temporary bridge; that not seeing any vehicle or anything from the plant that was working there he assumed that everything was clear; that the material service has an unloader and is built to go underneath bridges and is not a tunnel-stern boat, but is a regular boat, "no polywog or anything like that;" that "a tunnel-stern boat is tunnels constructible to the propellers so the water can get to them, this isn't that kind of a boat;" that in all boats the propellers are above the bottom; that he did not know "if there is any difference between the rapidity with which you can reverse the engines of a tunnel stern boat. I never operated a tunnel boat, this is a regular boat, the same as all cargo boats in size, she is not a pleasure boat or anything like that. She is a freight boat." On redirect he testified that the purpose of the bend whistle was to locate obstructions in the channel and that

when they do not hear any response to their whistle they assume that "it is clear and go ahead. That whistle is provided for by law;" that half speed is about three miles an hour; "Q. Assuming you are going that speed and her engines being reversed, about how long would it take for the backing to have effect? A. Why, it would start to have effect immediately. Q. I mean how long would it take before it would stop her headway? A. I could hardly estimate that in time, but in distance I might say that she would go probably 250 feet, maybe 200. Q. And that is backing her at full speed? A. Yes, sir;" that they speeded up when they got to the bend because of the heavy current at that point; that there they "have to give her speed" "in order to get through," sometimes get lines out and heave her through the hole. On recross-examination he testified that "there is a certain point somewhere between 200 and 400 feet from the scow when I first saw her or approximately so. I was probably 50 feet west of that point when I started to go full speed ahead. I do not believe that I gained any speed during that 50 feet;" that they were going three miles an hour when they started to back the vessel, about half speed; that she was going in the current and "because of that short bend there you have to reduce speed but there is not the current there that there is in the bridge draw."

The only witness for plaintiff who testified as to the accident was John Seiverson, a watchman, in the Keith boatyards. The only part of his testimony that bears upon the question as to whether or not Captain Brown was negligent in the handling of the Material Service before and at the time of the accident is the following: "Is there any way a power propelled vessel can stop other than by backing her engines? A. Yes, the other way -- Q. What other way? A. Getting a stern line out on the shore and

when they do not hear any response to their whistle they assume that "it is clear and go ahead. That whistle is provided for by law;" that half speed is about three miles an hour; "Q. Assuming you are going that speed and her engines being reversed, about how long would it take for the backing to have effect? A. Why, it would start to have effect immediately. Q. I mean how long would it take before it would stop her headway? A. I could hardly estimate that in time, but in distance I might say that she would go probably 250 feet, maybe 200. Q. And that is backing her at full speed? A. Yes, sir;" that they proceeded up when they got to the bend because of the heavy current at that point; that there they "have to give her speed" "in order to get through," sometimes get lines out and heave her through the hole. On recross-examination he testified that "there is a certain point somewhere between 200 and 400 feet from the scow when I first saw her or approximately so. I was probably 30 feet west of that point when I started to go full speed ahead. I do not believe that I gained any speed during that 30 feet;" that they were going three miles an hour when they started to back the vessel, about half speed; that she was going in the current and "because of that short bend there you have to reduce speed but there is not the current there that there is in the bridge draw."

The only witness for plaintiff who testified as to the accident was John Sylvesen, a watchman, in the Keith boatyards. The only part of his testimony that bears upon the question as to whether or not Captain Brown was negligent in the handling of the Material Service before and at the time of the accident is the following: "Is there any way a power propelled vessel can stop other than by backing her engines? A. Yes, the other way --. What other way? A. Getting a stern line out on the shore and

backing up against them. Q. All right. A. Yes, sir, getting lines out. Q. Take the Material Service as she was that night under way in the river, how was she going to get stern lines out? A. Well, -- Q. She would have to stop, wouldn't she, and come into the dock? A. She would have to draw on the side, the other side of the river or she could land a man there with a heaving line and get a line to the shore moorings and out to the boat. Q. Is there any other way than by getting a man on shore and putting out stern lines, in which a steamer can stop her headway, other than by backing? A. No, not exactly holding back, no. Q. What do you mean by not exactly? A. Well, not exactly, because except getting a line out, that will stop it, or throwing an anchor down. Q. Well, if she had thrown an anchor down she would have had to go the length of the anchor chain before the anchor would have any effect, wouldn't she? A. Well, not exactly. Q. Not exactly? A. No. No, she don't; the anchor will grab when it gets on the bottom." Plaintiff did not present any expert testimony as to the manner in which the Material Service should have been handled at the time and place in question. There is nothing in the testimony of Seiverson to show that he was qualified to give an opinion on the question, and the trial court would not have been justified in finding defendant guilty of negligence upon his testimony, especially in view of the testimony of Captain Brown.

The controlling question in this case is, Was the defendant guilty of negligence in the navigation of the barge? It cannot be disputed that the construction of the new bridge at Halsted street materially increased the difficulties of navigation in that vicinity. According to Captain Brown, as a result of the construction work a current was created which made it necessary for the barge to work full speed in order to get through the draw of the Halsted street

backing up against them. Q. All right. . . Now, sir, getting lines out. Q. Take the Memorial service on the one that night under way in the river, how was the going to get the lines out? A. Well, -- . . . She would have to stop, naturally, and come into the dock. A. She would have to throw on the side, the other side of the river or she could land a man there with a heaving line and get a line to the shore mooring and out to the boat. Q. Is there any other way than by getting a man on shore and putting out steam lines, in which a steamer can stop her leeway, either then by backing? A. No, not exactly backing back, no. Q. What do you mean by not exactly? A. Well, not exactly, because she is getting a line out, that will stop it, or throwing an anchor down. . . Well, if she had thrown an anchor down she would have had to go the length of the anchor chain and the tide would have may effect, wouldn't she? A. Well, not exactly. . . Not exactly? . . No. No, she doesn't, the anchor will drag when it gets on the bottom. Plaintiff did not produce any expert testimony as to the manner in which the Memorial service should have been handled at the time and place in question. There is nothing in the testimony of Swanson to show that he was qualified to give an opinion on the question, and the trial court would not have been justified in making determination of negligence upon his testimony, regardless in view of the testimony of Captain Brown.

The contributing question in this case is, was the defendant guilty of negligence in the navigation of the barge? It cannot be disputed that the construction of the new bridge at Malden created materially increased difficulties or navigation in that vicinity. According to Captain Brown, the result of the construction work a current was created which made it necessary for the barge to work full speed in order to get through the draw of the bridge against

bridge, whereas under former conditions the vessel was able to get through under half speed. It is shown, even by plaintiff's testimony, that as the barge approached the bend in the river west of the Halsted street bridge, she blew one long blast of her whistle as a signal that she was nearing the bend. Rule V, U. S. Code, provides:

> "Whenever a steam vessel is nearing a short bend or curve in the channel, where, from the height of the banks or other cause, a steam vessel approaching from the opposite direction cannot be seen for a distance of half a mile, such steam vessel, when she shall have arrived within half a mile of such curve or bend, shall give a signal by one long blast of the steam whistle, which signal shall be answered by a similar blast, given by any approaching steam vessel that may be within hearing. Should such signal be so answered by a steam vessel upon the farther side of such bend, then the usual signals for meeting and passing shall immediately be given and answered; but, if the first alarm signal of such vessel be not answered, she is to consider the channel clear and govern herself accordingly." (Sec. 203, Title 33, U. S. Code.)

While this rule seems to apply specifically to vessels approaching one another, nevertheless, in the case of the Michael Davitt, 28 Fed. 886, the court refers to this rule as requiring a precaution which "even in the absence of regulations, would be predicated by common sense and common prudence," and it seems clear to us that "common sense and common prudence" required the scow and derrick, that were obstructing the river draw, through which the Material Service had to pass, to give an answering signal which would have warned Captain Brown that the way was not clear, and that their failure in that regard was negligence that brought about the accident. There is nothing in the record to rebut the testimony of Captain Brown that the whistle he blew "is provided for by law" and that when there was no response he had the right to assume that it was clear ahead and that they might "go ahead." In his brief plaintiff contends that the barge, in the exercise of care and caution, should have done one of the three following things: "(1) Approached the bridge at a slow speed; (2) posted a lookout and received proper

bridge, whereas under former conditions the vessel was able to get through under full speed. It is shown, from plaintiff's testimony, that as the barge approached the bend in the river west of the limited street bridge, she blew one long blast of her whistle as a signal that she was rounding the bend. Rule 7, U. S. Code, provides:

"Whenever a steam vessel is rounding a short bend or curve in the channel, then, from the height of the banks or other cause, a steam vessel approaching from the opposite direction cannot be seen for a distance of half a mile, such steam vessel, when she shall have arrived within half a mile of such bend or curve or bend, shall give a signal by one long blast of the steam whistle, which signal shall be answered by a similar blast, given by any approaching steam vessel that may be within hearing. Should such signal be so answered by a steam vessel upon the starboard bow of such bend, then the usual signals for meeting and passing shall immediately be given and answered; but if the first signal of such vessel be not answered, she is to consider the channel clear and govern herself accordingly." (Sec. 203, Title 33, U. S. Code.)

While this rule seems to apply [illegible] to vessels rounding one another, nevertheless, in [illegible] 1 Wall. 60, Fed. 886, the court [illegible] rounding a projection which "even in the absence of [illegible] fog, could be ascertained by common sense and common prudence." [illegible] "common sense and common prudence" [illegible] the case in hand, that were obstructing the river [illegible] which the [illegible] Service had to pass, to give no [illegible] which would have warned Captain Brown that the way was [illegible] clear, and [illegible] failure in that regard was negligence [illegible] the accident. There is nothing in [illegible] the testimony of Captain Brown that [illegible] "[illegible] for by [illegible]" and that when there was no [illegible] to sound it was clear that [illegible] plaintiff contends that [illegible], in [illegible], should have done one of the [illegible] "(1) [illegible] the bridge at a low speed; (2) [illegible] proceed

signals indicating definitely before increasing speed, that the river was not obstructed by scows or derricks; or (3) gotten a stern line out to shore to retain control of the boat." As to the first: It is undisputed that the barge was proceeding at a speed of three miles an hour and while it appears that at a point about 50 feet west of where he first saw the obstructions in the draw of the bridge, the captain increased the speed of his engine, this change did not increase the headway of the vessel. The captain testified that it was necessary to increase the speed of the engine in order to have sufficient headway to breast the current that existed in the vicinity of the bridge; that to properly control a vessel going against the current one must have a headway at least equal to the speed of the current or the boat will be subjected to the "mercies" of the current. It is plain from his testimony that had he not reversed his engine there would have been a collision with the derrick and the tug, with loss of property, and possible loss of life. As to the second point made by counsel for plaintiff: The evidence is that there were two lookouts posted forward but that due to the physical situation and the conditions existing at the time and place the position of the tug and derrick could not be seen until the vessel had rounded the bend. The third suggestion is predicated solely upon the testimony of Seiverson. The captain of the Material Service, qualified by 50 years of service on vessels on the Great Lakes, 25 of which he served as a captain, testified that he did the only thing that he should have done under the circumstances. It is idle to argue that the testimony of Seiverson should have greater weight than that of Captain Brown. The trial court properly relied upon the testimony of the latter. From a reading of the bill of exceptions we note that in the cross-examination of Captain Brown counsel for plaintiff used a chart or map of the Chicago river and

signals indicating definitely before increasing speed, that the river was not obstructed by scows or derricks; or (3) position a steam line out to above to relieve control of the boat." As to the first: It is undisputed that the barge was proceeding at a speed of three miles an hour and while it appears that at a point about 30 feet west of where he first saw the obstructions in the draw of the bridge, the captain increased the speed of his engine, this change did not increase the power of the vessel. The captain testified that it was necessary to increase the speed of the engine in order to have sufficient leeway to breast the current that existed in the vicinity of the bridge; that to properly control a vessel going against the current one must have a leeway at least equal to the speed of the current or the boat will be swept back to the "mercies" of the current. It is plain from his testimony that had he not reversed his engine sooner could have been a collision with the derrick and the tug, with loss of property, and possible loss of life. As to the second point made by counsel for plaintiff: The evidence is that there were two lookers posted forward but due to the physical situation and the conditions and circumstances the view and place the position of the tug and derrick could not be seen until the vessel had rounded the bend. The alleged negligence is predicated solely upon the testimony of [illegible]. The captain of the Material Service, qualified by 30 years [illegible] on vessels on the Great Lakes, 13 of which he served as captain, testified that he did the only thing that he should have done under the circumstances. It is idle to argue that the testimony of [illegible] should have greater weight than that of [illegible]. The trial court [illegible] relied upon the testimony of the lookers. Upon a reading of the bill of exceptions it note that in the cross-examination of Captain Brown counsel for plaintiff used a chart or map of the Chicago River and

that Captain Brown indicated thereon various locations material to the inquiry as well as different obstructions that increased the difficulties of navigation at that place, but the chart was not offered in evidence and is not before us, and we are therefore denied an advantage that the trial court had. We are satisfied, from a careful examination of the bill of exceptions, that the trial court was justified in finding that defendant was not guilty of negligence that proximately contributed to bring about the accident in question, and it seems fairly plain to us that, under the evidence introduced, the owner of the tug and derrick is the party responsible for any damage plaintiff has sustained.

The judgment of the Municipal court of Chicago will be affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

that Captain Brown indicated thereon various locations material to the inquiry as well as different observations that increased the difficulties of navigation at that place, but the chart was not offered in evidence and is not before us, and we are therefore denied an advantage that the trial court had. We are satisfied, from a careful examination of the bill of exceptions, that the trial court was justified in finding that defendant was not guilty of negligence that proximately contributed to bring about the accident in question, and it seems fairly plain to us that, under the evidence introduced, the owner of the tug and derrick is the party responsible for any damage plaintiff has sustained.

The judgment of the municipal court of Chicago will be affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

37036

C. E. HERROD, Receiver of
UNIVERSAL STATE BANK,
Defendant in Error,

v.

MICHAEL ROZENSKI, STELLA
ROZENSKI, JOSEPH J. EZERSKI
and DOMINIK PIWARONAS,
Defendants.

JOSEPH J. EZERSKI and
DOMINIK PIWARONAS,
Plaintiffs in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

275 I.A. 638

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal court of Chicago, on October 6, 1931, judgment was entered by confession, on a judgment note, for the sum of $11,175.50 in favor of the Universal State Bank, a corporation, and against Michael Rozenski, Stella Rozenski, Joseph J. Ezerski and Dominik Piwaronas, defendants. On October 30, 1931, defendants Joseph J. Ezerski and Dominick Piwaronas filed a verified petition, in which they prayed "that they be given leave to defend the action of the plaintiff; that the said judgment may be opened and set aside so that a hearing may be had upon the merits; that execution be stayed and that upon a final hearing of the above cause, the said judgment may be set aside, vacated and declared for naught;" and "that said petition be permitted to stand as an affidavit of merits to the statement of claim filed herein." On January 25, 1932, it was ordered that defendants be given leave to appear and make defense to the cause, the judgment to stand as security, and that the petition stand as an affidavit of merits.

37026

C. E. HERRON, Receiver of
UNIVERSAL STATE BANK,
Defendant in error,

v.

MICHAEL KOZEMSKI, STELLA
KOZEMSKI, JOSEPH J. KEMPSKI
and DOMINIK PIWAKOWAS,
Defendants.

JOSEPH J. KEMPSKI and
DOMINIK PIWAKOWAS,
Plaintiffs in error,

MUNICIPAL
COURT OF CHICAGO.

275 I.A. 638

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal court of Chicago, on October 6, 1931, judgment was entered by confession, on a judgment note, for the sum of $11,175.80 in favor of the Universal State Bank, a corporation, and against Michael Kozemski, Stella Kozemski, Joseph J. Kempski and Dominik Piwakowas, defendants. On October 30, 1931, defendants Joseph J. Kempski and Dominik Piwakowas filed a verified petition, in which they prayed "that they be given leave to defend the action of the plaintiff; that the said judgment may be opened and set aside so that a hearing may be had upon the merits; that execution be stayed and that upon a final hearing of the above cause, the said judgment may be set aside, vacated and declared for naught;" and "that said petition be permitted to stand as an affidavit of merits to the statement of claim filed herein." On January 25, 1932, it was ordered that defendants be given leave to appear and make defense to the cause, the judgment to stand as security, and that the petition stand as an affidavit of merits.

Upon the same date defendants demanded a jury trial and on January 29, 1932, notwithstanding the order of January 25, they filed an affidavit of merits. On September 28, 1932, upon motion of plaintiff, an order was entered "that leave be and the same is hereby granted to substitute C. E. Herrod, Receiver of Universal State Bank, as plaintiff." On March 3, 1933, "defendant" was given leave to file an amended affidavit of merits instanter. Upon the trial a jury returned a verdict for plaintiff in the sum of $11,175.50. A motion for a new trial was overruled, and the court then entered the following final judgment: "This cause coming on for further proceedings herein, it is considered by the Court that final judgment be entered on the verdict herein, and that the judgment rendered herein against the defendants, Michael Rozenski, Stella Rozenski, Joseph G. Ezerski, and Dominik Piwaronas, on October 6th, 1931, for $11,175.50 stand confirmed in full force and effect as the judgment of this Court as of the date of rendition thereof, and that execution issue herein for the amount of said judgment together with plaintiff's costs in this as well as in that behalf expended." Defendants Joseph J. Ezerski and Dominik Piwaronas sued out this writ of error, but, at times, in the brief of plaintiffs in error it seems to be erroneously assumed that the Rozenskis are parties to the writ.

The judgment note in question was executed by defendants Michael Rozenski and Stella Rozenski. On the back of the note was a written guaranty of the payment of the note at maturity by defendants Ezerski and Piwaronas, which guaranty also contained a judgment clause. The amended affidavit of merits states:

"That the said note sued upon herein was dated at Chicago, Illinois, on May 22, 1930, payable on demand, and to the order of the Universal State Bank, in the sum of $10,000, signed by Michael Rozenski and Stella Rozenski, at the special instance and request of the plaintiff, through Joseph J. Elias, its President, and duly authorized agent, upon the express oral agreement, and understanding that the

Upon the same date defendants demanded a jury trial and on January 20, 1932, notwithstanding the order of January 20, they filed an affidavit of merits. On September 20, 1932, upon motion of plaintiff, an order was entered "that leave be and the same is hereby granted to substitute C. T. Herrod, Receiver of Universal State Bank, as plaintiff." On March 3, 1933, "defendant" was given leave to file an amended affidavit of merits instanter. Upon the trial a jury returned a verdict for plaintiff in the sum of $11,176.80. A motion for a new trial was overruled, and the court then entered the following final judgment: "This cause coming on for further proceedings herein, it is considered by the Court that final judgment be entered on the verdict herein, and that the judgment rendered herein against the defendants, Michael Roxenski, Stella Roxenski, Joseph G. Zeremi, and Dominik Piwarowas, on October 6th, 1931, for $11,176.80 stand confirmed in full force and effect as the judgment of this Court as of the date of rendition thereof, and that execution issue herein for the amount of said judgment together with plaintiff's costs in this as well as in that behalf expended." Defendants Joseph G. Zeremi and Dominik Piwarowas sued out this writ of error, but, at times, in the brief of plaintiffs in error it seems to be erroneously assumed that the Roxenskis are parties to the writ.

The judgment note in question was executed by defendants Michael Roxenski and Stella Roxenski. On the back of the note was a written guaranty of the payment of the note as maturity by defendants Zeremi and Piwarowas, which guaranty also contained a judgment clause. The amended affidavit of merits states:

"That the said note sued upon herein was dated at Chicago, Illinois, on May 22, 1930, payable on demand, and to the order of the Universal State Bank, in the sum of $10,000, signed by Michael Roxenski and Stella Roxenski, at the special instance and request of the plaintiff, through Joseph J. Kline, its President, and duly authorized agent, upon the express oral agreement, and understanding that the

said guaranty was conditionally delivered by these defendants, and placed in the hands of the plaintiff for the special purpose only and with the distinct understanding and oral agreement, that it was to become operative, or to become a binding obligation, as to these defendants only if the sum of $10,000, represented by said note should be used and disbursed by the plaintiff for and on behalf of the said Michael Rozenski solely for the purpose of building and constructing several bungalows or homes upon certain lots or parcels of land in a certain subdivision known as Lockport Highlands, located in or near the City of Lockport, in Will County, Illinois, the building of which would facilitate the sale of lots in said subdivision; and the plaintiff, through its agent, then and there promised and agreed with these defendants, to hold, control the said note and disburse and apply said sum of $10,000 solely for said purpose and that such delivery to the plaintiff was not for the purpose of transferring property in the instrument unless and until the sum of $10,000 was disbursed by the plaintiff as aforesaid; but these defendants aver and charge that the said plaintiff did not at any time whatsoever, pay out or disburse the said $10,000, or any part thereof.

"* * * state that the plaintiff did not at any time pay out or disburse the sum of $10,000, or any part thereof, for the purpose aforesaid. And so these defendants state and charge that the delivery of said guaranty by these defendants, to the plaintiff, was conditional and for a special purpose only, and the delivery thereof having been limited by the condition aforesaid, it having been delivered subject to said conditions, and the said conditions not having been consummated, due to plaintiff's failure to perform or comply with the condition, the said guaranty never became a completed and binding contract.

"* * * state the fact to be that they signed said guaranty of said note upon the representation by the plaintiff to these defendants, that Michael Rozenski was a financially responsible and solvent person, and that if these defendants so signed said guaranty, the said plaintiff would never hold these defendants liable thereon as guarantors, for the reason that plaintiff would look for the payment thereof solely to Michael Rozenski and not to these defendants; and further that they, these defendants, would not be held liable thereon if the $10,000 represented by said note should not be used or applied by the plaintiff in the building or constructing of several bungalows or homes upon certain lots or parcels of land in a certain subdivision known as Lockport Highlands located in or near the City of Lockport, in Will County, Illinois, the expenditure or disbursements of which $10,000, the said plaintiff then and there promised to look after and apply solely for said purpose, and these defendants would not ever have to look to its application for said purpose at any time; and these defendants relying upon and believing in said representation of said plaintiff and being induced by said oral agreement of said plaintiff, did then sign said guaranty as guarantors thereof, as aforesaid, but these defendants state the fact to be that the plaintiff did not make the loan of $10,000 to Michael Rozenski and Stella Rozenski at any time whatsoever.

"* * * state the fact to be that the plaintiff did not at any time pay out or disburse the sum of $10,000 or any part thereof for the purpose aforesaid.

"* * * allege that the said Michael Rozenski, one of the defendants herein paid unto the Universal State Bank, on account of said note the sum of $6,264.20 as follows:

said guaranty was conditionally delivered by these defendants, and placed in the hands of the plaintiff for the special purpose only and with the distinct understanding and oral agreement, that it was to become operative, or to become a binding obligation, as to these defendants only if the sum of $10,000, represented by said note should be used and disbursed by the plaintiff for and on behalf of the said Michael Donnelly solely for the purpose of building and constructing several bungalows or houses upon certain lots or parcels of land in a certain subdivision known as Lookport Highlands, located in or near the City of Lockport, in Will County, Illinois, the building of which would facilitate the sale of lots in said subdivision, and the plaintiff, through its agent, then and there promised and agreed with these defendants, to hold, conserve and distribute and apply said sum of $10,000 solely for said purpose and that such delivery to the plaintiff was not for the purpose of creating property in the instrument unless and until the sum of $10,000 was disbursed by the plaintiff as aforesaid; but in as disbursements over and above that the said plaintiff did not at any time whatsoever pay out or disburse the said $10,000, or any part thereof.

"* * * state that the plaintiff did not at any time pay out or disburse the sum of $10,000, or any part thereof, for the purposes aforesaid. And so these defendants state and allege that the delivery of said guaranty by these defendants to the plaintiff, was conditional and for a special purpose only, and the delivery thereof having been limited by the condition aforesaid, to having been delivered subject to said conditions, and the said conditions not having been consummated, due to the plaintiff's failure to pay over or comply with the condition, the said guaranty never became a completed and binding contract.

"* * * admits the fact to be true, they signed said guaranty of said note upon the representation by the plaintiff to these defendants, that Michael Donnelly was a financially responsible and solvent person, and that if these defendants so signed said guaranty, the said plaintiff would never hold these defendants liable thereon as guarantors, for the reason that plaintiff would look for the payment thereof solely to Michael Donnelly, and not to these defendants; and further that they, these defendants, would not be held liable thereon if the $10,000 represented by said note should not be used or applied by the plaintiff in the building or construction of several bungalows or houses upon certain lots or parcels of land in a certain subdivision known as Lookport Highlands located in or near the City of Lockport, in Will County, Illinois, the construction of it buildings of which $10,000, the said plaintiff then and there promised to look after and apply solely for said purpose, and that these defendants would not ever have to look to the plaintiff for said purpose, and that and these defendants relying upon and believing in said representation of said plaintiff, and being induced by said oral agreement of said plaintiff, did then sign said guaranty as mentioned therein, as aforesaid, but that defendants deny the fact to be that the said plaintiff did not make the loan of $10,000 to Michael Donnelly and Edith Donnelly at any time whatsoever.

"* * * state the fact to be that the plaintiff did not at any time pay out or disburse the sum of $10,000 or any part thereof for the purpose aforesaid.

"* * * allege that the said Michael Donnelly, one of the defendants herein paid unto the Universal State Bank, on account of said note the sum of $[illegible] as follows:

"May 23, 1930	by check	$5703.92
"September 3, 1930	by check	60.28
"September 9, 1930	by check	500.00

"* * * allege that the said Michael Rozenski also assigned a two-fifths interest of his right, title and interest in a Real Estate Syndicate on property located at Lockport, Illinois, to the Universal State Bank, and has signed all his right, title and interest in and to a syndicate on property located at 115th street in Chicago, Illinois, to the Universal State Bank, as additional security to said Universal State Bank.

"* * * therefore allege that the note herein confessed upon has been fully paid and satisfied.

"* * * say that on September 28, 1932, C. E. Herrod, Receiver of the Universal State Bank was substituted as party plaintiff to the judgment heretofore entered by confession in favor of Universal State Bank, former party plaintiff herein; that the original judgment, as entered, was not vacated nor was an amended statement of claim filed setting forth, under oath, the authorization by which C. E. Herrod became receiver, and that he is the equitable and bona fide owner of said judgment, as required by Statute in such cases made and provided, and therefore these defendants deny that C. E. Herrod, as Receiver, is a proper party plaintiff in this suit.

"* * * state the fact to be that they are not indebted to the plaintiff in the sum of $10,000, or in any sum whatsoever, and deny that the plaintiff is entitled to the said alleged claim for which plaintiff brings this suit."

Plaintiffs in error contend that under the facts set up in the amended affidavit of merits and the proof the note "was conditionally delivered by them on the distinct understanding and agreement with the Universal State Bank, through Joseph J. Elias, its president and duly authorized agent, that the obligation was to be binding and operative only if the sum of $10,000, represented by the note, should be disbursed by the plaintiff for the purpose of building and constructing several bungalows or homes in a certain subdivision known as Lockport Highlands in Lockport, Illinois;" and that "since no part of the $10,000 was disbursed for the building of bungalows, the obligation never became a completed and binding contract." Michael and Stella Rozenski, the makers, made no defense of any kind to the note, although Michael Rozenski was a witness in the trial. In so far as they are concerned, it must be assumed that there was no condition of any kind attached to the note.

"May 23, 1930	by check	4500.00
"September 3, 1930	by check	00.00
"September 9, 1930	by check	500.00

"* * * allege that the said Richard Zoesnell also assigned a two-fifths interest of his right, title and interest in a Real Estate Syndicate on property located at Lockport, Illinois, to the Universal State Bank, and has signed all his right, title and interest in and to a syndicate on property located at 11th street in Chicago, Illinois, to the Universal State Bank, as additional security to said Universal State Bank.

"* * * therefore allege that the note herein conferred upon has been fully paid and satisfied.

"* * * May then on September 23, 1931, G. E. Herred, Receiver of the Universal State Bank was substituted as party plaintiff to the judgment heretofore entered by consent in favor of Universal State Bank, former party plaintiff merely; that the original judgment, as entered, was not vacated nor was an amended statement of claim filed setting forth, under oath, the authorization by which G. E. Herred became receiver, and that he is the entitled and bona fide owner of said judgment, as required by statute in such cases made and provided, and therefore these defendants deny that G. E. Herred, as Receiver, is a proper party plaintiff in this suit.

"* * * state the fact to be that they are not indebted to the plaintiff in the sum of $10,000, or in any sum whatsoever, and deny that the plaintiff is entitled to the said alleged claim for which plaintiff brings this suit."

Plaintiffs in error contend that under the facts set up in the amended affidavit of merits and the order the note "was conditionally delivered by them on the distinct understanding and agreement with the Universal State Bank, through Joseph J. Kline, its president and duly authorized agent, that the obligation was to be binding and operative only if the sum of $10,000, represented by the note, should be disbursed by the plaintiff for the purpose of building and constructing several bungalows or homes in a certain subdivision known as Lockport Highlands in Lockport, Illinois;" and that "since no part of the $10,000 was disbursed for the building of bungalows, the obligation never became a completed and binding contract." Michael and Stella Zoesnell, the makers, made no defense of any kind to the note, although Michael Zoesnell was a witness in the trial. In so far as they are concerned, it must be assumed that there was no condition of any kind attached to the note.

The major contention of plaintiffs in error is that "the verdict is against the manifest weight of the evidence." This contention has been argued so strenuously that in our determination of it, we have seen fit to read, very carefully, the entire bill of exceptions. Plaintiff contends that defendants' testimony does not tend to establish a conditional delivery of the note, but tends, rather, to establish a conditional contract with Elias, the president of the bank. While this contention is not without force, nevertheless, we do not deem it necessary to determine it, and in our consideration of the instant contention of plaintiffs in error, we have assumed, for the purposes of this writ of error, that the latter made a prima facie showing that there was a conditional delivery of the note. Plaintiffs in error concede, of course, that the burden was upon them to prove conditional delivery of the note. After a painstaking consideration of the entire evidence bearing upon the question of the alleged conditional delivery, we are satisfied that the jury were fully justified in finding that the delivery of the note was not a conditional one. The jury saw the witnesses and heard them testify, and had a better opportunity than we have to determine their credibility and the weight, if any, that should be attached to the testimony of each witness. Moreover, we find certain mountain peaks in the evidence that very seriously weaken the theory of fact of plaintiffs in error. To cite a few: At the same time that the $10,000 note here sued upon was executed by the Rozenskis, May 22, 1930, the latter also executed another note, for $10,000, bearing the same date, payable on demand to Jos. J. Ezerski and D. Piwaronas, and bearing interest at seven per cent. On the back of this note appears the following indorsement: "It is hereby agreed and understood by all parties concerned that this note becomes payable only on the death of the maker and has been given as security for the

The major contention of plaintiffs in error is that "the verdict is against the manifest weight of the evidence." This contention has been argued as strenuously that in our determination of it, we have been fit to read, very carefully, the entire bill of exceptions. Plaintiff contends that defendants' testimony does not tend to establish a conditional delivery of the note, but tends, rather, to establish a conditional contract with Miles, the president of the bank. While this contention is not without force, nevertheless, we do not deem it necessary to determine it, and in our consideration of the instant contention of plaintiffs in error, we have assumed, for the purposes of this writ of error, that the latter made a prima facie showing that there was a conditional delivery of the note. Plaintiffs in error concede, of course, that the burden was upon them to prove conditional delivery of the note. After a painstaking consideration of the entire evidence bearing upon the question of the alleged conditional delivery, we are satisfied that the jury were fully justified in finding that the delivery of the note was not a conditional one. The jury saw the witnesses and heard them testify, and had a better opportunity than we have to determine their credibility and the weight, if any, that should be attached to the testimony of each witness. Moreover, we find certain mountain peaks in the evidence that very seriously weaken the theory of fact of plaintiffs in error. To cite a few: At the same time that the $10,000 note here sued upon was executed by the Kennamins, May 22, 1926, the latter also executed another note, for $10,000, bearing the same date, payable on demand to one, C. Merritt and D. Pierstorff, and bearing interest at seven per cent. On the back of this note appears the following indorsement: "It is hereby agreed and understood by all parties concerned that this note becomes payable only on the death of the maker and has been given as security for the

endorsement of a note like in amount dated today in favor of the Universal State Bank." (Italics ours.) It further appears that at the time of the execution of these two notes Rozenski owed Piwaronas $825, and the former testified that prior to May 22, he told Piwaronas that he would pay him this $825 out of the proceeds of the note in question; and it also appears that as soon as that note was credited by the bank to Rozenski's account he gave Piwaronas his check for $825, which the latter used. Piwaronas signed his name to the guaranty on the back of the note when it was brought to his place of business by Rozenski and Ezerski. Piwaronas originally testified that he had not signed any other notes that had any connection with the Lockport Highlands Syndicate property but he afterward admitted that on November 22, 1929, he, Michael Rozenski and Anton Berzynski executed a judgment note for $9,500, which was discounted by plaintiff bank and which had to do with that property. It was Elias, not the bank, who had an interest in that property. Rozenski, Ezerski and Piwaronas were friends. They had been depositors of the bank for a considerable length of time and "had prior dealings" with it. They were businessmen. While the Lockport Highlands Syndicate had an account with the bank, the proceeds of the note in question were credited at once by the bank to the account of Michael Rozenski.

Plaintiffs in error contend that "the Court was in error in treating C. E. Herrod, as receiver of the bank, as plaintiff when no adequate amendment of the pleadings was in fact made." In Hoes v. Van Alstyne, 20 Ill. 201, it appeared that during the pendency of the suit the plaintiff died and his death was suggested, and the executors under his will were substituted as plaintiffs. No amendment to the declaration was made nor was there any new declaration filed. Because of this state of the record the defendant

endorsement of a note like in amount dated today in favor of the Universal State Bank." (Italics ours.) It further appears that at the time of the execution of these two notes Rosenwald owed Fitzsimons $825, and the former testified that prior to May 28, he told Fitzsimons that he would pay him this $825 out of the proceeds of the note in question; and it also appears that as soon as that note was credited by the bank to Rosenwald's account he gave Fitzsimons his check for $825, which the latter used. Fitzsimons signed his name to the guaranty on the back of the note when it was brought to his place of business by Rosenwald and Martell. Fitzsimons originally testified that he had not signed any other notes that had any connection with the Longport Highlands Syndicate property but he afterward admitted that on November 22, 1926, he, Michael Rosenwald and Anton Herzynski executed a judgment note for $9,800, which was discounted by plaintiff bank and which had to do with that property. It was Miles, not the bank, who had an interest in that property. Rosenwald, Herzynski and Fitzsimons were friends. They had been depositors of the bank for a considerable length of time and "had prior dealings" with it. They were businessmen. While the Longport Highlands Syndicate had an account with the bank, the proceeds of the note in question were credited at once by the bank to the account of Michael Rosenwald.

Plaintiffs in error contend that the court was in error in treating v. . Buried, as a creditor of the bank, as plaintiff when no adequate endorsement of the pleadings was in fact made." In Hoen v. Van Alstyne, 80 Ill. 301, it appeared that during the pendency of the suit the plaintiff died and his death was suggested, and the executors under his will were substituted as plaintiffs. No amendment to the declaration was made nor was there any new declaration filed. Because of this state of the record the defendant

contended that the judgment entered should be reversed, and in passing upon this contention the court said:

"This declaration was in assumpsit. During the pendency of the action the plaintiff died, and his representatives were made parties under our statute, but the declaration was not amended by inserting their names as plaintiffs. The cause was tried upon the general issue, which was found for the plaintiffs, and it is now assigned for error, that their names were not inserted in the declaration. It has not been the practice, under our statute, where the representatives of a deceased party are made parties, to amend the declaration by the insertion of their names, nor do we think it required by the statute. Whether the other course would not have been the better practice at the beginning, it is unnecessary now to say; but we think the statute will fairly bear a construction conformable to the practice, and after that has been so long and uniformly acted upon and acquiesced in by the courts and the bar, we ought not to hunt up ingenious pretexts for overturning it. We cannot reverse this judgment for this cause."

In Bale v. Bale, 242 Ill. 519, the appellants contended that the court erred in proceeding to a hearing after the death of the complainant and the substitution of his widow as complainant without an amendment of the pleadings "setting up the will of her husband and giving appellants an opportunity to traverse and contest her right to her husband's interest under his will." The court, in holding that the contention was without merit, said: "It is the usual practice when a party in interest dies pending litigation, to make those who succeed to his interest parties on a mere suggestion of his death and of their interest." In Hinchliffe v. Wenig Teaming Co., 274 Ill. 417, 425, the court cites, with approval, the rule laid down in Hoes v. Van Alstyne, supra. In section 11 of the act on Banks, Cahill's Ill. Rev. St., 1933, ch. 16a, par. 11, it is provided:

"Such receiver (referring to a receiver appointed for a closed bank), under the direction of the Auditor, shall take possession of, and for the purpose of the receivership, the title to, the books, records and assets of every description of such bank, and shall proceed to collect all debts, dues and claims belonging to it * * *. Such receiver shall have authority to sue and defend in his own name with respect to the affairs, assets, claims, debts and choses in action of such bank."

By the aforesaid provisions C. E. Herrod, receiver of Universal State Bank, succeeded to the ownership of the claim herein involved and the

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In Dale v. Dale, 242 Ill. 519, the appellants contended that the court erred in proceeding to a hearing after the death of the complainant and the substitution of his widow as complainant without an amendment of the pleadings "setting up the will of her husband and giving appellants an opportunity to traverse and contest her right to her husband's interest under his will." The court, in holding that the contention was without merit, said: "It is the usual practice when a party in interest dies pending litigation, to make those who succeed to his interest parties on a mere suggestion of his death and of their interest." In Kindlitz v. Lewis Leaning Co., 274 Ill. 417, 420, the court cites, with approval, the rule laid down in Hoge v. Van Alstyne, supra. Subsection 11 of the act on Banks, Ishbill's Ill. Rev. St., 1933, ch. 16½, par. 11, it is provided:

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By the aforesaid provisions C. W. Herrod, receiver of Universal State Bank, succeeded to the ownership of the claim herein involved and the

judgment recovered upon it, upon his appointment as receiver, and it was then his plain duty to have an order entered in the instant case substituting himself as a party plaintiff in the place and stead of the bank. Such an order was entered by the court on September 28, 1932, and there is nothing in the record to indicate that plaintiffs in error made any objection to the entry of the order at the time it was made. Plaintiffs in error contend that the record does not show that an affidavit was filed in support of the motion for substitution. Every presumption is in favor of the order and we cannot assume that the court acted without a proper showing. Plaintiffs in error contend that there is no proof in the record that the bank was insolvent nor that C. E. Herrod became receiver thereof. It is a sufficient answer to this contention to say that plaintiffs in error in their amended affidavit of merits, state "that on the 28th day of September, 1932, C. E. Herrod, receiver of the Universal State Bank, was substituted as party plaintiff to the judgment heretofore entered by confession in favor of Universal State Bank, former party plaintiff herein."

Plaintiffs in error contend that "the court was without jurisdiction to enter an order changing the plaintiffs to the judgment after the term had expired." This contention is without the slightest merit. The judgment by confession was entered on October 6, 1931, and on September 28, 1932, an order was entered substituting C. E. Herrod as receiver of the Universal State Bank, instead of Universal State Bank, as party plaintiff. The original judgment was by confession. This is a case in the Municipal court and plaintiffs in error, within the thirty-day period, during which the court had full jurisdiction to vacate or modify any judgment, filed a petition asking "that the said judgment may be opened and set aside so that a hearing may be had upon the merits," etc. This motion was allowed save that the judgment was

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to stand as security. Under such a state of the record the court retained full jurisdiction of the persons and the subject matter, and it might thereafter vacate the judgment or confirm it in whole or in part. Because of the action of plaintiffs in error the cause was heard upon the merits. The claim of the bank did not terminate because the bank became insolvent and a receiver was appointed, nor was the obligation of the contract thereby impaired. The receiver, in this action, merely stood in the shoes of the bank. The cases cited by plaintiffs in error in support of the instant contention have no application to a record like the instant one. We note that a jury had been sworn to try the instant case and the opening statements had been made before plaintiffs in error made even an oral motion to expunge the order of substitution.

Plaintiffs in error finally contend that counsel for plaintiff in his closing argument to the jury indulged in an unfair and prejudicial argument. Counsel for plaintiff had stated to the jury that Elias was not his client and that he was not concerned in any quarrel "between Elias and between Rozenski or Piwaronas or Ezerski;" that "you are going to decide whether or not Mr. Herrod as receiver for the depositors of this closed bank is going to secure judgment -- Mr. Halligan (counsel for plaintiffs in error): I object to that, if the Court please. Mr. Gatenbey (counsel for plaintiff): -- against these people. Mr. Halligan: I object to that, if the Court please, and ask that it be stricken and ask that the jury be instructed now that it is not the depositors but the stockholders who are seeking this. There is no evidence on it." The court ruled that he was not going to instruct the jury who was seeking to recover the judgment, that the jury understood that there was a plaintiff in the case and "to treat him as a plaintiff and nobody else." Counsel for plaintiffs in error then stated: "And what about my objection? Overruled? The

to stand as security. Under such a state of the record the court retained full jurisdiction of the persons and the subject matter, and it might thereafter vacate the judgment or confirm it in whole or in part. Because of the motion of plaintiffs in error the cause was heard upon the merits. The claim of the bank did not terminate because the bank became insolvent and a receiver was appointed, nor was the obligation of the contract thereby impaired. The receiver, in this action, merely stood in the shoes of the bank. The cause cited by plaintiffs in error in support of the instant contention have no application to a record like the instant one. We note that a jury had been sworn to try the instant case and the opening statements had been made before plaintiffs in error made even an oral motion to expunge the order of substitution.

Plaintiffs in error finally contend that counsel for plaintiff in his closing argument to the jury indulged in an unfair and prejudicial argument. Counsel for plaintiff had stated to the jury that Miss was not his client and that he was not concerned in any quarrel "between Miss and between Rosenwald or Riverness or Swarski;" that "you are going to decide whether or not Mr. Herrod as receiver for the depositors of this closed bank is going to secure judgment -- Mr. Halligan (counsel for plaintiffs in error): I object to that, if the Court please. Mr. Gatenby (counsel for plaintiff): -- against these people. Mr. Halligan: I object to that, if the Court please, and ask that it be stricken and ask that the jury be instructed now that it is not the depositors but the stockholders who are seeking this. There is no evidence on it." The court ruled that he was not going to instruct the jury who was seeking to recover the judgment, that the jury understood that there was a plaintiff in the case and "to treat him as a plaintiff and nobody else." Counsel for plaintiffs in error then stated: "And what about my objection? Overruled? The

Court: I overrule your objection in this respect, I will not instruct the jury who in your opinion is the plaintiff." Counsel for plaintiffs in error made no objection to this ruling of the court and they are therefore in no position to now urge the instant contention. Moreover, the court was entirely correct in refusing to instruct the jury as counsel requested. In view of the attitude of counsel for plaintiffs in error in his argument to the jury, he is in no position to complain of the statement made by counsel for plaintiff. In his closing argument counsel for plaintiffs in error told the jury that the suit was commenced "to get some dough for Joe (Elias)," that the suit was not prosecuted "to try to get some money for depositors. There isn't any evidence that the depositors will share in it." Throughout his entire argument counsel insisted that Elias was the real plaintiff.

This case seems to have been fairly tried. The jury found against plaintiffs in error and the trial court sustained their finding.

The judgment of the Municipal court of Chicago will be affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

Court: I overrule your objection in this respect, I will not instruct the jury who in your opinion is the plaintiff." Counsel for plaintiffs in error made no objection to this ruling of the court and they are therefore in no position to now urge the instant contention. Moreover, the court was entirely correct in refusing to instruct the jury as counsel requested. In view of the attitude of counsel for plaintiffs in error in his argument to the jury, he is in no position to complain of the statement made by counsel for plaintiff. In his closing argument counsel for plaintiffs in error told the jury that the suit was commenced "to get some dough for Joe (Miles)," that the suit was not prosecuted "to try to get some money for depositors. There isn't any evidence that the depositors will share in it." In opening his entire argument counsel insisted that Miles was the real plaintiff.

This case seems to have been fairly tried. The jury found against plaintiffs in error and the trial court sustained their finding.

The judgment of the municipal court of Chicago will be affirmed.

AFFIRMED.

Sullivan, P. J., and Barley, J., concur.

37074

LEE TIRE & RUBBER CO. OF NEW YORK,
a corporation,
Appellant,

v.

ANTHONY J. TOREN et al.,
Appellees.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

275 I.A. 639

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In a suit in assumpsit a jury returned a verdict for defendants. Upon appeal we reversed the judgment entered upon the verdict and remanded the cause for a new trial. (See Lee Tire & Rubber Co. v. Toren et al., 266 Ill. App. 599 Abst.) After remandment defendants filed a set-off and affidavit of claim alleging damages in the sum of $88,875. Thereafter plaintiff filed an amended declaration consisting of the common counts and an affidavit of claim setting forth in detail the charges and credits. Defendants then filed a plea of non assumpsit and an affidavit of merits averring that they did not receive 80 of the 190 tires for which plaintiff was suing and also claiming damages in the sum of $54,000 by reason of a breach of the contract that had been entered into between plaintiff and defendant. Upon the second trial the jury returned a verdict finding the issues for defendants on the plea of set-off and against plaintiff on its declaration and assessed defendants' damages at the sum of $13,000. Plaintiff has appealed from a judgment entered upon the verdict.

In this court defendants have filed motions to strike from the record the bill of exceptions, or, in the alternative, that plaintiff's exhibits 6, 6-A and 6-B be stricken from the

37074

THE VIAS & BOWMAN CO. OF NEW YORK,
a corporation,
Appellant,

v.

ANTHONY J. YOUNG et al.,
Appellees.

APPEAL FROM EXTENSION
COURT OF COOK COUNTY.

275 I.A. 639

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In a suit in assumpsit a jury returned a verdict for defendants. Upon appeal we reversed the judgment entered upon the verdict and remanded the cause for a new trial. (See Vias Tire & Rubber Co. v. Young et al., 262 Ill. App. 599 Abst.) After remandment defendants filed a set-off and affidavit of claim alleging damages in the sum of $8,875. Thereafter plaintiff filed an amended declaration consisting of the common counts and an affidavit of claim setting forth in detail the charges and credits. Defendants then filed a plea of non assumpsit and an affidavit of merits averring that they did not receive 80 of the 100 tires for which plaintiff was suing and also claiming damages in the sum of $64,000 by reason of a breach of the contract that had been entered into between plaintiff and defendant. Upon the second trial the jury returned a verdict finding the issues for defendants on the plea of set-off and against plaintiff on its declaration and assessed defendants' damages at the sum of $13,000. Plaintiff has appealed from a judgment entered upon the verdict.

In this court defendants have filed motions to strike from the record the bill of exceptions, or, in the alternative, that plaintiff's exhibits 4, 6-A and 6-B be stricken from the

bill of exceptions and to affirm the judgment as per suggestions filed, all of which motions were reserved until the hearing. After a consideration of the same we have concluded that all should be denied, and an order will be entered to that effect.

Plaintiff's theory is that from November 1, 1929, until October 31, 1930, it sold and delivered to defendants certain tires and that after allowing all just credits and set-offs to defendants there was due it from defendants the sum of $18,102.67. Plaintiff and defendants entered into a contract by the terms of which plaintiff was to supply and sell to defendants exclusively in the city of Chicago "solid tires, 6, 7, 8 and 9" (inch) pneumatic truck tires, except to car dealers Mfg. branches and national accounts." The period of the contract was from November 1, 1929, to October 31, 1930. In a supplemental agreement plaintiff agreed to give defendants a rebate provided "the volume with Lee Tire & Rubber Company amounts to $150,000 during the length of this agreement." Defendants' set-off and affidavit of claim averred, inter alia, that plaintiff, without notice, cause or reason sold tires to other large dealers in Chicago, in violation of the contract; that plaintiff advised other dealers that they could obtain through it or its authorized agents as many tires as they desired and that various large distributors did obtain tires from plaintiff or through its agents, to the great damage of defendants. The affidavit of merits to the amended declaration also alleged in detail that plaintiff had failed to credit defendants with proper deductions, credits and set-offs in regard to rebates and adjustments and that plaintiff also failed to comply with the contract as to quality of goods furnished and the giving of rebates.

Plaintiff argues at length that the evidence was not sufficient to support the verdict and that the verdict is contrary to the manifest weight of the evidence. The bill of exceptions

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Plaintiff argues at length that the evidence was not sufficient to support the verdict and that the verdict is contrary to the manifest weight of the evidence. The bill of exceptions

does not show that any motion for a new trial was made by plaintiff, and it is the settled law of this state that in order to bring the question of the sufficiency of the evidence to sustain a verdict before an Appellate court for review it is necessary for the losing party to make a motion for a new trial, and, upon its being overruled, to except to such ruling, and to include such motion, the order overruling the same and his exception thereto, together with the evidence, in the bill of exceptions. (Yarber v. Chicago and Alton Ry. Co., 235 Ill. 589, 597; People v. Leonardi, 338 Ill. 177, 178; Foreman-State Tr. & Sav. Bank v. Demster, 347 Ill. 72, 79; People v. Lehner, 335 Ill. 424, 431.) It is true that the first division of this court in Pralle v. Metropolitan Life Ins. Co., 252 Ill. App. 460, 467, held (Mr. Justice Matchett dissenting) that a motion for a new trial need not be included in the bill of exceptions if it appears in the common law record, but the Supreme court, in reviewing that cause, adhered to its settled rule. (Pralle v. Metropolitan Life Ins. Co., 346 Ill. 58, 63.)

Plaintiff contends that it was error to permit Joseph Toren to testify to the extraction by an employee of plaintiff of certain delivery tickets from the delivery book of plaintiff. After counsel for plaintiff had moved to strike the evidence in question, the court interrogated counsel as follows: "The Court: It doesn't do any harm, does it? Mr. Silvertrust (counsel for plaintiff): No." Thereupon the court ruled that it might stand.

Plaintiff next contends that the court erred in permitting the witness Purves to testify, over its objection, that between November 1, 1929, and October 31, 1930, he purchased approximately $10,000 worth of tires from the Lee company. The objection made to the testimony was that "approximately $10,000 is vague and indefinite and doesn't tend to prove anything;" to which the court replied: "The Court: You can cross examine.

does not show that any motion for a new trial was made by plaintiff, and it is the settled law of this state that in order to bring the question of the sufficiency of the evidence to sustain a verdict before an appellate court for review it is necessary for the losing party to make a motion for a new trial, and, upon its being overruled, to except to such ruling, and to include such motion, the order overruling the same and his exception thereto, together with the evidence, in the bill of exceptions. (Yerkes v. Chicago and Alton Ry. Co., 255 Ill. 589, 597; Koenig v. Lauenroth, 358 Ill. 177, 178; Yorkson-State Tr. & Sav. Bank v. Dressler, 347 Ill. 72, 79; Koepke v. Lehmer, 358 Ill. 424, 431.) It is true that the first division of this court in Krallis v. Metropolitan Life Ins. Co., 336 Ill. App. 480, 487, held (Mr. Justice McSurely dissenting) that a motion for a new trial need not be included in the bill of exceptions if it appears in the common law record, but the Supreme court, in reversing that cause, adhered to its settled rule. (Krallis v. Metropolitan Life Ins. Co., 360 Ill. 58, 62.)

Plaintiff contends that it was error to permit Joseph Toron to testify to the conversation by an employee of plaintiff at certain delivery stations from the delivery book of plaintiff. After counsel for plaintiff had moved to strike the evidence in question, the court interrogated counsel as follows: "The Court: It doesn't do any harm, does it? Mr. Silverstein (Counsel for plaintiff): No." Thereupon the court ruled that it might stand.

Plaintiff next contends that the court erred in permitting the witness Jurvos to testify, over its objection, that between November 1, 1928, and October 31, 1929, he purchased approximately $10,000 worth of tires from the tire company. The objection made to the testimony was that "approximately $10,000 is vague and indefinite and doesn't tend to prove anything;" to which the court replied: "The Court: You can cross examine.

That is your privilege." We find no error in the ruling.

Plaintiff next contends that the court erred in allowing the witness Toren to testify "in regard to the salesmen's salary." Plaintiff argues that even if the amount paid to salesmen was a proper element of damages, the testimony as to the amount was improper, for the reason that no deduction was made as to the amount of earned commissions. Plaintiff has not referred to the part of the record that bears upon this contention and we might therefore ignore the contention. We find, however, that a book containing the amounts of salaries paid was admitted in evidence by agreement, and the present contention, if we understand it, is, therefore, without merit.

Plaintiff next contends that the court erred in refusing to strike, upon its motion, Toren's testimony "in the nature of a compilation of exhibits 1, 2, 3, 4 and 5." This testimony was based upon the said exhibits, which were in evidence by agreement. Toren's "compilation testimony" was not objected to at the time that it was given, but during the cross-examination of the witness plaintiff moved to strike the witness's testimony that he had made a calculation of defendants' exhibit 1, consisting of invoices of sale made to Akron Tire & Vulcanizing Company, on an adding machine, and that the amount was $55,839.05. The only motion to strike to which counsel calls our attention relates to that exhibit. Plaintiff argues that if we examine the entire testimony of the witness we will come to the conclusion "that the witness did not make nor intend to make an accurate calculation and that his testimony, in order to get the figures in evidence, was a deliberate falsehood," and that for that reason the entire "compilation testimony" should be stricken. There is no merit in this argument. If Toren's testimony was false or inaccurate plaintiff had the right to show that fact by cross-examination, and it had the further right to put on witnesses to

that is your privilege." I find no error in the ruling.

Plaintiff next contends that the court erred in allowing the witness Toren to testify "in regard to the salesmen's salary." Plaintiff argues that even if the amount paid to salesmen was a proper element of damages, the testimony as to the amount was improper, for the reason that no deduction was made as to the amount of earned commissions. Plaintiff has not referred to the part of the record that bears upon this contention and we might therefore ignore the contention. I find, however, that a book containing the amounts of salaries paid was admitted in evidence by agreement, and the present contention, if we understand it, is, therefore, without merit.

Plaintiff next contends that the court erred in refusing to strike, upon its motion, Toren's testimony "in the nature of a complication of exhibits 1, 2, 3, 4 and 5." This testimony was based upon the said exhibits, which were in evidence by agreement. Toren's "complication testimony" was not objected to at the time that it was given, but during the cross-examination of the witness plaintiff moved to strike the witness's testimony that he had made a calculation of defendants' exhibit 1, consisting of invoices of sale made to Akron Tire & Vulcanizing Company, on an adding machine, and that the amount was $22,888.00. The only motion to strike to which counsel calls our attention relates to that exhibit. Plaintiff argues that if we examine the entire testimony of the witness we will come to the conclusion "that the witness did not make any intent to make an accurate calculation and that his testimony, in order to get the figures in evidence, was a deliberate falsehood," and that for that reason the entire "complication testimony" should be stricken. There is no merit in this argument. If Toren's testimony was false or inaccurate plaintiff had the right to show that fact by cross-examination, and it had the further right to ask on witnesses to

testify as to what a compilation of the figures showed. Plaintiff did not see fit to offer any such evidence. It appears from an examination of the evidence that certain of the compilations that plaintiff now complains of where brought out by its cross-examination.

Plaintiff next contends that the court erred in permitting the witness Elmer Kelly to testify that he purchased tires from the Acorn Truck Manufacturing Company, that "plaintiff could not be bound by these acts and to permit witness to testify to them was to prejudice plaintiff's legal rights. It could only give the jury one impression, and that was the plaintiff had connived with the witness for the purchase of tires, which was not the fact. The testimony failed to show any semblance of a connivance and it was error to allow the jury to receive such an impression." The set-off alleged that plaintiff entered into a fraudulent scheme to evade the terms of the contract, and plaintiff, by its failure to file a motion for a new trial, is not now in a position to question the sufficiency of the evidence to support defendants' case in that regard; nevertheless, we find sufficient evidence in the record to support defendants' theory of fact that plaintiff, in order to evade the contract, arranged to have shipments made to various tire merchants, at points outside of Chicago, who were confederates or mere tools of plaintiff, and to have them make shipments to various dealers in Chicago, other than defendants. The argument of plaintiff that the evidence fails to show a scheme to evade the contract, is apparently based upon the theory that as there is no direct evidence tending to prove that plaintiff entered into any such scheme defendants' set-off fails. Such a scheme may be proved by direct evidence or by circumstantial evidence, and if all the circumstances in evidence taken together are sufficient to prove the scheme alleged by defendants then the acts and statements of

tentatively as to what a compilation of the figures showed. Plaintiff did not see fit to offer any such evidence. It appears from an examination of the evidence that portions of the compilations that plaintiff now complains of were brought out by its cross-examination.

Plaintiff most emphatically that the court erred in permitting the witness Elmer Kelly to testify that he purchased tires from the Acorn Truck Manufacturing Company, that "plaintiff could not be bound by these acts and to permit witness to testify to them was to prejudice plaintiff's legal rights. It could only give the jury one impression, and that was the plaintiff had connived with the witness for the purchase of tires, which was not the fact. The testimony failed to show any semblance of a conviveness and it was error to allow the jury to receive such an impression." The set-off alleged that plaintiff entered into a fraudulent scheme to evade the terms of the contract, and plaintiff, by its failure to file a motion for a new trial, is not now in a position to question the sufficiency of the evidence to support defendants' case in that regard; nevertheless, we find sufficient evidence in the record to support defendants' theory of fact that plaintiff, in order to evade the contract, arranged to have shipments made to various tire merchants, at points outside of Chicago, who were confederates or mere tools of plaintiff, and to have them make shipments to various dealers in Chicago, other than defendants. The argument of plaintiff that the evidence fails to show a scheme to evade the contract, is apparently based upon the theory that as there is no direct evidence tending to prove that plaintiff entered into any such scheme defendants' set-off fails. Such a scheme may be proved by direct evidence or by circumstantial evidence, and if all the circumstances in evidence taken together are sufficient to prove the scheme alleged by defendants then the acts and statements of

all who participated in the scheme, in furtherance of it, are competent evidence against plaintiff. It is very seldom possible to prove that parties met and agreed upon such a scheme.

Plaintiff next contends that the court erred in allowing the witness Larsen to testify, over its objection, "that his firm had a contract with plaintiff. The contract was not produced or even offered. If this witness had a contract the contract itself was the best evidence, and to permit the witness to testify to a contract without the contract being in evidence was highly prejudicial." The witness stated that his company had a contract with plaintiff to purchase tires. The answer was not responsive to the question put by defendants' counsel. Counsel objected to the answer on the ground that "the contract is the best evidence." While the court overruled the objection he directed the witness to answer the question put to him. The lack of merit in the instant contention is shown by the fact that plaintiff's witness Earl testified, without objection: "We had a contract with Purves and Elmer Kelly. I am not sure if we had a contract with Larsen but I am inclined to believe we did."

Plaintiff next contends that the court erred in allowing the witness Nuppenau to testify that on January 16, 1930, he had taken twenty-one delivery receipts out of plaintiff's delivery book before he gave the book to defendants. Nuppenau was then the shipping, receiving and stock clerk for plaintiff. It appears from the bill of exceptions that the testimony of Nuppenau that he took the twenty-one tickets out of the book was not objected to. When the witness was asked to whom he delivered the book the court sustained plaintiff's objection to the question. When counsel for defendants in his closing argument referred to this evidence the court informed the jury that all of the testimony as to the twenty-one tickets was stricken out. Plaintiff also contends that the court erred in admitting in evidence

all who participated in the scheme, in furtherance of it, are competent evidence against plaintiff. It is very seldom possible to prove that parties met and agreed upon such a scheme.

Plaintiff next contends that the court erred in allowing the witness Larsen to testify, over his objection, "that his firm had a contract with plaintiff. The contract was not produced or even offered. If this witness had a contract the contract itself was the best evidence, and to permit the witness to testify to a contract without the contract being in evidence was highly prejudicial." The witness stated that his company had a contract with plaintiff to purchase cities. The answer was not responsive to the question put by defendants' counsel. Counsel objected to the answer on the ground that "the contract is the best evidence." While the court overruled the objection he directed the witness to answer the question put to him. The lack of merit in the instant contention is shown by the fact that plaintiff's witness Earl Swaffield, without objection, "We had a contract with Curvis and Timer Kelly. I am not sure if we had a contract with Larsen but I am inclined to believe we did."

Plaintiff next contends that the court erred in allowing the witness Muppenan to testify that on January 16, 1937, he had taken twenty-one delivery receipts out of plaintiff's delivery book before he gave the book to defendants. Muppenan was then the shipping, receiving and stock clerk for plaintiff. It appears from the bill of exceptions that the testimony of Muppenan that he took the twenty-one tickets out of the book was not objected to. When the witness was asked to whom he delivered the book the court sustained plaintiff's objection to the question. Then counsel for defendants in his closing argument referred to this evidence the court informed the jury that all of the testimony as to the twenty-one tickets was stricken out. Plaintiff also contends that the court erred in admitting in evidence

over its objection defendants' exhibit 1 of March 29, 1933, which Huppenau testified that he had received from the Cook Tire Co., Inc., of Grand Rapids, Michigan. Plaintiff contends that there was no proof that the Cook Tire Company "was a branch of the plaintiff or that plaintiff either wrote or sent the invoice, or that plaintiff was even interested in the company." It is a sufficient answer to this contention to say that the trial court found that there was sufficient evidence to prove that the Cook Tire Company was a party to plaintiff's scheme to evade its contract with defendants and that we agree with the trial court's finding in that regard.

Plaintiff contends that the court erred in admitting in evidence over its objection defendants' exhibits 59, 60 and 62. Defendants' exhibit 59 is as follows:

"LEE TIRE SALES COMPANY
Service that Saves
Fourth and Chestnut Streets
Phone Lincoln 506
Evansville, Ind.

October 27, 1930

Purves & Given,
Chicago, Ill.

My dear Mr. Purves:

I am enclosing a letter of Mr. Pettingill's for your information, also a copy of my letter in reply.

Kindly return Mr. Pettingill's letter for my files, and oblige.

Something is going to pop in Chicago between now and the first of the year and in my letter to Mr. Pettingill I have outlined a channel for you to get Lee Tires.

Mr. Taylor has met Mr. Fitzgerald and if Mr. Fitzgerald wants to buy some Lee Tires here in Evansville, I cannot refuse to sell them.

Let me hear from you.

Yours very truly,

LEE TIRE SALES COMPANY,
R. E. Rodgers."

KER:AM

Defendants' exhibit 60 is as follows:

over its objection defendants' exhibit 1 of March 29, 1955, which happened testified that he had received from the Cook Tire Co., Inc., of Grand Rapids, Michigan. Plaintiff contends that there was no proof that the Cook Tire Company "was a branch of the plaintiff or that plaintiff either wrote or sent the invoice, or that plaintiff was even interested in the company." It is a sufficient answer to this contention to say that the trial court found that there was sufficient evidence to prove that the Cook Tire Company was a party to plaintiff's scheme to evade its contract with defendants and that we agree with the trial court's finding in that regard.

Plaintiff contends that the court erred in admitting in evidence over its objection defendants' exhibits 59, 60 and 62.

Defendants' exhibit 59 is as follows:

"LEE TIRE SALES COMPANY
Service that Serves
Tourist and Commercial Grounds
Phone Lincoln 866
Evansville, Ind.

October 27, 1954

Purves & Girvin,
Chicago, Ill.

My dear Mr. Purves:

I am enclosing a letter of Mr. Pettingill's for your information, also a copy of my letter in reply.

Kindly return Mr. Pettingill's letter for my files, and oblige.

Something is going to pop in Chicago between now and the first of the year and in my letter to Mr. Pettingill I have outlined a channel for you to get Lee Tires.

Mr. Taylor has met Mr. Fitzgerald and if Mr. Fitzgerald wants to buy some Lee Tires here in Evansville, I cannot refuse to sell them.

Let me hear from you.

Yours very truly,

LEE TIRE SALES COMPANY,
H. E. Rodgers."

KER:AM

Defendants' exhibit 60 is as follows:

"LEE TIRE AND RUBBER CO.
Conshohocken, Pa.

October 21, 1930

Mr. Emmett Rodgers
Lee Tire Sales Co.
Evansville, Ind.

Dear Emmett:

It so happens that we have an understanding with Toren Brothers whereby they have the exclusive sale of Truck Pneumatic Tires in Chicago, and we therefore try to give them all possible protection, and it has now been brought to light that Tom Purves seems to be getting all the Lee Truck Pneumatic Tires he wants without buying them from the Lee Branch, and when asked where he gets them, he states: 'What difference does it make? Maybe I get them from Grand Rapids, maybe I get them from Evansville or maybe I get them from Columbus.'

I am asking you in all fairness whether he has approached you and whether you have sold them any Lees. You might have innocently sold him some, and if you have we would appreciate it very much if you would not let him have any more.

Respectfully yours,

H. L. PETTINGELL
Eastern Division Manager."

HLP:S

Defendants' Exhibit 62 is as follows:

"LEE TIRE SALES COMPANY
Service that Saves
Fourth and Chestnut Streets
Phone Lincoln 506
Evansville, Ind.

October 18, 1930

Purves & Given,
1122 Washington Blvd. cor. May St.,
Chicago, Ill.

Dear Sirs:

We have not received your remittance for the tires shipped you last month. We understand that we are having this for you on a purely 2% basis, and we are very glad to accommodate you, but we must insist on your getting your check in on the 10th of the month so that we can remit to the factory.

I have just returned from the factory, having spent a week with Mr. Garthwaite, and I think it will only be a short time when there will be quite a shake-up at the Chicago Branch.

My advice to you is to sit tight on the Lee Agency, since I have given Mr. Garthwaite some inside dope, as he and I both see it a branch is not necessary in Chicago, but the agency should be given just two or three good accounts.

It will take some time to clear up the situation as it

"LEE TIRE AND RUBBER CO.
Connersville, Ind."

October 21, 1930

Mr. Merritt Rodgers
Lee Tire Sales Co.
Evansville, Ind.

Dear Merritt:

It so happens that we have an understanding with Joran Brothers whereby they have the exclusive sale of Truck Insuncle Tires in Chicago, and we therefore try to give them all possible protection, and it has now been brought to light that Ton Jurvan seems to be getting all the Lee Truck Insuncle Tires he wants without buying them from the Lee Branch, and when called upon to note them, he states: 'What difference does it make. Maybe I get them from Grand Rapids, maybe I get them from Evansville or maybe I get them from Connersville.'

I am writing you in all kindness (hoping he has approached you and whether you have sold him any Lees. You might have innocently sold him some, and if you have no doubt approaches it very much if you would not let him have any more.

Sincerely yours,

H. L. PRINGLE
Eastern Division Manager."

HLP:S

Defendants' exhibit 62 is as follows:

"LEE TIRE SALES COMPANY
Service that Saves
Fourth and Jefferson Streets
Phone Kimball 8006
Evansville, Ind.

October 16, 1930

Purves & Olsen,
1127 Washington Blvd. cor. Ley St.,
Chicago, Ill.

Dear Sirs:

We have not received your remittance for the tires shipped you last month. We understand that we are having this for you on a purely 30 basis, and we are very glad to accommodate you, but we must insist on your getting your check in on the 10th of the month so that we can remit to the factory.

I have just returned from the factory, having spent a week with it. Certainly, and I think it will only be a short time when there will be quite a shake-up at the Chicago Branch.

By moving to you is to get right on the Lee agency, since I have given Mr. Carbondale some trade dope, so if and I both see if a branch is not necessary in Chicago, but the agency should be given just two or three good accounts.

It will take some time to clear up the situation as it

exists now, but Mr. Garthwaite has assured me that he is going to close every branch that does not pay.

Hoping to receive your check by return mail, I am

Yours very truly,

R. E. RODGERS
ER:AM LEE TIRE SALES COMPANY."

The objection interposed to exhibit 59 was that Lee Tire Sales Company was not an agent of plaintiff and that the communication was addressed to a separate dealer in Chicago. While the bill of exceptions does not show an objection to exhibit 60 or 62, we assume from a colloquy between the court and counsel that it was assumed that the same kind of objection was interposed to them. The court in admitting the three exhibits ruled that the proof tended to show a connection between the parties to the several letters and plaintiffs, and we agree with his ruling in that regard. We may here state that the proof shows that H. L. Pettingell was the eastern manager of plaintiff and that Mr. Garthwaite was its vice president and general manager. Plaintiff argues that exhibit 60 shows that Mr. Pettingell requested Emmett Rodgers not to let Purves have any more tires. Defendants answer by calling attention to the fact that when Mr. Pettingell wrote that letter the contract between the parties had but ten days to run, and argue that the letter shows an effort by plaintiff "to cover up."

Plaintiff contends that "the court erred in refusing to permit plaintiff to cross examine (Joseph Toren) on exhibits used by defendants for the purpose of refreshing the memory of defendants' witness." As the record shows that the cross-examination of Toren extends over 110 pages of the bill of exceptions it is rather difficult to seriously consider an argument that the court unduly restricted the cross-examination of the witness. The direct examination and cross-examination of this witness were based on exhibits introduced by agreement or stipulation, and, as we have

exists now, but Mr. Gertsmeier has assured me that he is going to close every branch that does not pay.

Hoping to receive your check by return mail, I am

Yours very truly,

R. T. CONNOR
THE TIRE SALES COMPANY,

RT:AM

The objection interposed to exhibit 59 was that the Tire Sales Company was not an agent of plaintiff and that the communication was addressed to a separate dealer in Chicago. While the bill of exceptions does not show an objection to exhibit 60 or 61, we assume from a colloquy between the court and counsel that it was assumed that the same kind of objection was interposed to them. The court in admitting the three exhibits ruled that the proof tended to show a connection between the parties to the several letters and plaintiffs, and we agree with his ruling in that regard.

We may here state that the proof shows that R. L. Whitingell was the eastern manager of plaintiff and that Mr. Gertsmeier was its vice president and general manager. Plaintiff argues that exhibit 60 shows that Mr. Whitingell represented Mesnit Rubber not to let Tires have any more tires. Defendants answer by calling attention to the fact that when Mr. Whitingell wrote that letter the contract between the parties had but ten days to run, and argue that the letter shows an effort by plaintiff "to cover up."

Plaintiff contends that "the court erred in refusing to permit plaintiff to cross examine (Joseph Toren) on exhibits used by defendants for the purpose of refreshing the memory of defendants' witness." As the record shows that the cross-examination of Toren extends over 110 pages of the bill of exceptions it is rather difficult to seriously consider an argument that the court unduly restricted the cross-examination of the witness. The direct examination and cross-examination of this witness were based on exhibits introduced by agreement or stipulation, and, as we have

heretofore stated, if plaintiff was not satisfied with the compilation made by Toren it had ample opportunity to prove by its own accountants, or otherwise, the incorrectness of the testimony, but it failed to do so.

Plaintiff contends that the court erred in permitting defendant Joseph Toren "to construe that portion of the contract dealing with 'Price Decline.'" It is a sufficient answer to this contention to state that prior to the giving of the testimony in question counsel for plaintiff, upon cross-examination, interrogated Toren as to how he construed certain words in the contract.

Plaintiff next contends that the court erred in construing the term "mfg. branches" contained in the contract as meaning branches of plaintiff. Plaintiff argues that the court's construction was erroneous and that while the court eventually informed the jury as to the correct meaning of the words in question, he failed to inform the jury that he had changed his former ruling as to the meaning of the words. Plaintiff contends that it was the intention of the parties that the term "mfg. branches" meant branches of car or truck manufacturers. The court instructed the jury "as a matter of law that under the contract in question, plaintiff had the right to sell solid tires and 6", 7", 8" and 9" truck pneumatic tires to truck manufacturers, car dealers, and national accounts in the City of Chicago, County of Cook and State of Illinois." Defendants justly complain that this instruction was too favorable to plaintiff.

Plaintiff next contends that the court erred in making prejudicial remarks in the presence of the jury. Four alleged instances are called to our attention, but from an examination of the bill of exceptions we find that no objection of any kind was made to any of the remarks. But one merits mention. When defendants' exhibit 1, the invoice from Cook Tire Company to the L. & L. Tire Company, was offered in evidence counsel for

heretofore stated, if plaintiff was not satisfied with the compilation made by Toren it had ample opportunity to prove by its own accountants, or otherwise, the incorrectness of the testimony, but it failed to do so.

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Plaintiff next contends that the court erred in making prejudicial remarks in the presence of the jury. Four alleged instances are called to our attention, but from an examination of the bill of exceptions we find that no objection of any kind was made to any of the remarks. But one merits mention. When defendants' exhibit 1, the invoice from Cook Tire Company to the U. S. Tire Company, was offered in evidence counsel for

plaintiff, in objecting, stated that the Cook Tire Company was a separate concern. After the court had ruled that the exhibit might be admitted in evidence counsel for plaintiff inquired of the court, "How can we stop such a thing?" to which the court replied, "If you can't, you better not go out and make such a contract." If the court erred in making the statement the error was induced by the unwarranted question of plaintiff's counsel. The court had ruled and had several times stated why he considered such evidence competent. Plaintiff contends that prior to the closing arguments the trial court informed counsel in chambers that he would give an instruction, if one were presented, to the effect that anything that occurred before January 16 was covered by the agreement of that date, which settled all violations of contracts up to that time, and after this statement of the court counsel for defendants referred in his argument to the testimony of Nuppenau that twenty-one delivery tickets were taken out of plaintiff's delivery ticket book. Upon objection to this statement the court ruled with plaintiff and held that all evidence in reference to the tickets had been stricken out. While the court was wrong in assuming that the evidence in question had been stricken, nevertheless, plaintiff had the benefit of this ruling. Moreover, as we have heretofore stated, counsel for plaintiff admitted to the court that no harm had been done plaintiff by the testimony as to the twenty-one tickets.

Plaintiff next contends that the court erred in overruling plaintiff's motion for a new trial, and in support of this contention counsel has seen fit to state in his brief alleged happenings at the time of the alleged motion for a new trial, none of which is shown by the bill of exceptions. Defendants' counsel justly complain of the nature of the argument made in support of the instant contention. It is sufficient to say, in answer to it, that the bill of exceptions

plaintiff, in objecting, stated that the Cook Tire Company was a separate concern. After the court had ruled that the exhibit might be admitted in evidence counsel for plaintiff inquired of the court, "How can we stop such a thing?" to which the court replied, "If you can't, you better not go out and make such a contract." If the court erred in making the statement the error was induced by the unwarranted question of plaintiff's counsel. The court had ruled and had several times stated why he considered such evidence competent. Plaintiff contends that prior to the closing arguments the trial court informed counsel in chambers that he would give an instruction, if one were presented, to the effect that anything that occurred before January 15 was covered by the agreement of that date, which settled all violations of contracts up to that time, and after this statement of the court counsel for defendants referred in his argument to the testimony of Hoppenman that twenty-one delivery tickets were taken out of plaintiff's delivery ticket book. Upon objection to this statement the court ruled with plaintiff and held that all evidence in reference to the tickets had been stricken out. While the court was wrong in assuming that the evidence in question had been stricken, nevertheless, plaintiff had the benefit of this ruling. Moreover, as we have heretofore stated, counsel for plaintiff admitted to the court that no harm had been done plaintiff by the testimony as to the twenty-one tickets.

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fails to show that any motion for a new trial was made.

We have now considered all of the contentions raised by plaintiff. Two juries have found against it and the trial judge in each instance sustained the verdict. Plaintiff's counsel concede that a very able and experienced judge presided at the last trial, but they have seen fit to state in their brief that he was ill at the time of the trial and that his condition was such that he was "hypnotized into committing many errors." The record affirmatively shows that the trial judge was mentally alert during the entire trial and that he presided and ruled with fairness and ability, and we find nothing in the record to warrant any statement to the effect that he was ill or physically indisposed during the proceedings. The verdict was returned April 3, 1933, and judgment was entered April 22, 1933. The record further shows that the judge was holding court until the summer vacation, which commenced in July. He died September 4, 1933. Under the record in this case counsel was not justified in making the statements as to the alleged condition of the trial judge.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

fails to show that any motion for a new trial was made.

We have now considered all of the contentions raised by plaintiff. Two juries have found against it and the trial judge in each instance sanctioned the verdict. Plaintiff's counsel concede that a very able and experienced judge presided at the last trial, but they have seen fit to state in their brief that he was ill at the time of the trial and that his condition was such that he was "hypnotized into committing many errors." The record affirmatively shows that the trial judge was mentally alert during the entire trial and that he presided and rulled with fairness and ability, and we find nothing in the record to warrant any statement to the effect that he was ill or physically indisposed during the proceedings. The verdict was returned April 6, 1932, and judgment was entered April 22, 1932. The record further shows that the judge was holding court until the summer vacation, which commenced in July. He died September 4, 1932. Under the record in this case counsel was not justified in making the statements as to the alleged condition of the trial judge.

The judgment of the superior court of Cook County is affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

37107

BERNICE LARSON,
Defendant in Error,

v.

MAX RAPHAEL, WALTER E. ROGAN and CHICAGO TITLE AND TRUST COMPANY, a Corporation,
Defendants.

WALTER E. ROGAN,
Plaintiff in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

275 I.A. 639[2]

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

By this writ of error Walter E. Rogan, plaintiff in error (one of the defendants below), seeks to reverse a decree entered in a foreclosure suit based upon a junior mortgage trust deed. The bill was dismissed as to defendant Raphael, and defendant Chicago Title and Trust Company, a corporation, failed to file an appearance in the cause.

The bill alleged that plaintiff in error claimed to have some interest in the premises, "as purchasers, mortgagee, trustee, tenants, or otherwise, which interest, if any, are subsequent to the lien of the said trust deed held by your Oratrix, and are, and each of them is subject thereto." Plaintiff in error, by his answer does not assert any interest of any kind in the premises in question The cause was referred to a master in chancery, who heard evidence and recommended a decree of foreclosure. Plaintiff in error, alone filed objections to the master's report.

Complainant produced the note and trust deed in the hearing before the master and they were received in evidence. "Defendants" called complainant as a witness. She testified that she was a stenographer for the law firm of Hart, Frank & Shomberg, solicitors for complainant; that she did not own the trust deed in question "except for the purpose of this foreclosure;" that she was "not the

STATE

HERMINE LARSON,
Defendant in Error,

v.

MAX HAYNEN, WALTER R. NOGAN
and CHICAGO TITLE AND TRUST
COMPANY, a Corporation,
Defendants.

WALTER R. NOGAN,
Plaintiff in Error,

MOTION TO SUPPLEMENT RECORD

OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

By this writ of error Walter R. Nogan, plaintiff in error (one of the defendants below), seeks to reverse a decree entered in a foreclosure suit based upon a junior mortgage trust deed. The bill was dismissed as to defendant Haynen, and defendant Chicago Title and Trust Company, a corporation, failed to file an appearance in the cause.

The bill alleged that plaintiff in error claimed to have some interest in the premises, "as owners, mortgagee, lessee, tenants, or otherwise, which interest, if any, is subsequent to the lien of the said trust deed held by your orator, and are, and each of them is subject thereto." Plaintiff in error, by his answer does not assert any interest of any kind in the premises in question. The cause was referred to a master in chancery. The usual evidence and recommended a decree of foreclosure. Plaintiff in error, alone filed objections to the master's report.

Complainant produced the note and trust deed in evidence. Two witnesses before the master and they were received in evidence. "Defendants" called complainant as a witness. The transcript shows that he was a stenographer for the law firm of Barr, Franz & Anderson, noting here for complainant; that one Hyl was the real party in interest "except for the purpose of this foreclosure;" that he was "not the

owner of this note (the note in question), except for the purpose of foreclosure;" that Edward Kalish, a client of the said law firm, gave the note and trust deed to her and instructed her to give them to Mr. Frank and for the latter to start a foreclosure suit in her name; that she gave the papers to Mr. Frank, at the same time stating to him: "Mr. Kalish gave me these papers to give to you, and he would like to have you start a foreclosure suit in my name, Mr. Frank;" that she asked the latter if the matter was all right and he told her it was. Plaintiff in error had a full opportunity to interpose before the master any defense he might have to the note and trust deed, but the only evidence he introduced was the testimony of complainant, the material part of whose evidence we have stated.

The sole contentions of plaintiff in error are: (a) "Complainant being a nominee with no interest whatsoever in the note involved in this proceeding, cannot foreclose the mortgage, and the decree granting foreclosure to complainant should be reversed;" and (b) "The decree foreclosing the mortgage should be reversed, for the owner of the indebtedness was not made a party to the suit."

The note in question is made payable to bearer and the trust deed provides:

> "In the event of a breach of any of the aforesaid covenants or agreements, the whole of said indebtedness, including principal and all earned interest, shall, at the option of <u>the legal holder</u> thereof, without notice, become immediately due and payable and with interest thereon from time of such breach, at seven per cent recoverable by foreclosure hereof, or by suit at law, or both, the same as if all of said indebtedness had then matured by express terms."

By this provision the right to recover upon the note by foreclosure or by suit at law, or both, is conferred upon "the legal holder" of the note and trust deed.

Contention (a) has been determined, and adversely to plaintiff in error, in the recent case of <u>Witting v. Claras</u>, 274 Ill.

owner of this note (the note in question), except for the purpose of foreclosure; that Edward Smith, a client of the said law firm, gave the note and trust deed to me and instructed me to give them to Mr. Frank and for the latter to write a promissory note in his name; that the gave the money to Mr. Frank, at the same time stating to him: "Mr. Smith does not wish to give to you, and he would like to have you start a foreclose in this in my name, Mr. Frank;" that you used the letter if the owner was all right and he told me it was. Alexander in attempted a full opportunity to interpose before the master my defense. Inasmuch as the note and trust deed, but the only witness to introduced was the testimony of questioned, the material part of whose evidence we have stated.

The sole contentions of plaintiff in error are: (a) "Same plaintiff being a nominee with no interest whatsoever in the note involved in this proceeding, merely prosecutes the matter, and the decree granting foreclosure to complainant should be reversed;" and (b) "The decree foreclosing the mortgage should be reversed, for the owner of the indebtedness was not made a party to the suit."

The note in question is with coupons in number and the trust deed provides:

> "In the event of a default in any of the covenants, agreements or conditions, then and in said instrument, then and in said principal and all accrued interest, shall, at the option of the legal holder thereof, without notice, become immediately due and payable, and with interest thereon from the date of such default, at such per cent per annum as shall be stated therein, or by law, or in equity, the same as if all of said indebtedness did then mature by express terms."

By this provision the whole [illegible] upon the order of foreclosure or by suit at law, or [illegible], is predicated upon "the legal holder" of the note and trust deed.

Conclusion (a) is been [illegible], and obviously, to claim-

ait in error, is the recent case of [illegible] v. [illegible], 348 Ill.

App. 449 (decided by the first division of this court), where the facts and the contention made are the same as in the instant case. We find ourselves in full accord with that decision.

As to contention (b), we see no good reason why, under the facts of this case, plaintiff in error should complain that Kalish was not made a party to the proceeding. Before the master plaintiff in error offered proof to the effect that the complainant was not the owner of the note and that she had no beneficial interest in it whatsoever; that Edward Kalish was the real owner of the note and trust deed and that he gave the note and trust deed to complainant to have his solicitors, Hart, Frank & Shomberg, start foreclosure proceedings in the name of the complainant and that the instant foreclosure proceedings were started in accordance with his directions, and that the solicitors for complainant in this cause are also solicitors for Mr. Kalish. Complainant, in the court below and here, concedes these facts. It seems idle for plaintiff in error to argue that "were he to pay the amount of the same to complainant, he would not be protected in another suit by the actual owner," Edward Kalish. As we have heretofore stated, plaintiff in error had a full opportunity to interpose any defense he might have to the note and trust deed, but no defense was interposed save the one that complainant was not the real owner of the note and trust deed and had no beneficial interest in them. Complainant was the legal holder of the note and trust deed and entitled to maintain foreclosure.

The decree of the Superior court of Cook county is affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

App. 149 (decided by the first division of this court), where the facts and the contention made are the same as in the instant case. We find ourselves in full accord with such decision.

As to contention (b), we see no good reason why, under the facts of this case, plaintiff in error could complain that Smith was not made a party to the proceeding. Before the master plaintiff in error offered proof to the effect that the complainant was not the owner of the note and that she had no pecuniary interest in it whatsoever; that Howard Smith was the real owner of the note and trust deed and that he gave the note and trust deed to complainant to have his solicitors, Hurt, Frank & Shumaker, start foreclosure proceedings in the name of the complainant and that the instant foreclosure proceedings were started in accordance with his directions, and that the solicitors for complainant in this cause are also solicitors for Mr. Smith. Complainant, in the court below and here, conceded these facts. It seems idle for plaintiff in error to argue that "were he to pay the amount of the note to complainant, he would not be protected in making suit by the rightful owner," Howard Smith. As we have heretofore stated, plaintiff in error had a full opportunity to interpose any defense he might have to the note and trust deed, but no defense was interposed save the one that complainant was not the real owner of the note and trust deed and had no beneficial interest in them. Complainant was the legal holder of the note and trust deed and entitled to maintain foreclosure.

The decree of the superior court of cook county is affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

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37119

MARY J. VOGELGANG,
Appellee,

v.

S. S. KRESGE COMPANY,
a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

275 I.A. 639

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued S. S. Kresge Company, a corporation, George P. Karavites and Thomas G. Gleavenites in case. After all defendants had plead to the declaration, plaintiff, in consideration of $1,000 paid to her by defendants Karavites and Gleavenites, signed a covenant agreeing not to sue them and thereafter the suit was dismissed as to them. The case was tried before the court with a jury and there was a verdict returned finding defendant S. S. Kresge Company (hereinafter also called Kresge) guilty and assessing plaintiff's damages at the sum of $15,000. The court required plaintiff to remit $3,000, and this having been done the motion for a new trial was denied and judgment was entered in the amount of $12,000. This appeal followed.

The declaration consists of three counts. The first alleges that on April 2, 1931, the defendants and each of them, "themselves or by their agents and servants in that behalf, were possessed of and had charge and control of and were maintaining and operating a certain building known * * * as * * * 4001 West North Avenue, Chicago, * * * said building consisting of several

37139

MARY L. VONNEGAN,
Appellee,

v.

S. S. KRESGE COMPANY,
a Corporation,
Appellant.

A FRAN THEN BURNSIDE COURT
OF COOK COUNTY.

275 I.A. 639

MR. JUSTICE MCAVOY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued S. S. Kresge Company, a corporation, George T. Karavites and Thomas G. Giavonitos in case. After all defendants had pleaded to the declaration, plaintiff, in consideration of $1,000 paid to her by defendants Karavites and Giavonitos, signed a covenant agreeing not to sue them and thereafter the suit was dismissed as to them. The case was tried before the court with a jury and there was a verdict returned finding defendant S. S. Kresge Company (hereinafter also called Kresge) guilty and assessing plaintiff's damages at the sum of $18,000. The court required plaintiff to remit $2,000, and this having been done the motion for a new trial was denied and judgment was entered in the amount of $16,000. This appeal followed.

The declaration consists of three counts. The first alleges that on April 5, 1931, the defendants and each of them, "themselves or by their agents and servants in that behalf, were possessed of and had charge and control of and were maintaining and operating a certain building known * * * as * * * 4001 West North Avenue, Chicago, * * * said building consisting of several

floors and a basement equipped with a certain heating plant which, in conjunction with the said building aforesaid was possessed of and * * * maintained, operated and controlled by the said defendants and each of them, by themselves or their agents and servants * * *; that a certain portion of the said building * * * was * * * equipped and used as a store to which the general public were invited to come as prospective customers, either expressly or impliedly * * *. And it thereupon * * * became * * * the duty of the said defendants and each of them, as aforesaid, to use due and proper care in and about the operation, management and control of the premises aforesaid, together with the said heating plant so maintained, operated and controlled in conjunction with and as an integral part of the said building * * * so as not to endanger such members of the general public as were, then and there, in, upon and about the said premises either by the express or implied invitation of the said defendants and each of them; * * * that on the day * * * in question she (plaintiff) was, then and there, lawfully and rightfully in and upon the said premises and was, then and there, and at all times prior thereto, in the exercise of ordinary care for her own safety; and plaintiff avers that on the day * * * aforesaid, while she was so lawfully and rightfully in and upon the said premises, the said defendants and each of them, themselves or by their agents and servants in that behalf, wholly regardless of their duty in the premises, as aforesaid, so carelessly, negligently and improperly maintained, operated and controlled the said premises * * * and particularly the said heating plant so maintained, operated and controlled by the said defendants and each of them in conjunction with and as a necessary integral part of the premises * * * that by and through the negligence of the defendants and each of them, as aforesaid, and as a

floors and a basement equipped with a certain heating plant which, in conjunction with the said building aforesaid was possessed of and * * * maintained, operated and controlled by the said defendants and each of them, by themselves or their agents and servants * * *; that a certain portion of the said building * * * was * * * equipped and used as a store to which the general public were invited to come as prospective customers, either expressly or impliedly * * *. And it thereupon * * * became * * * the duty of the said defendants and each of them, as aforesaid, to see due and proper care in and about the operation, management and control of the premises aforesaid, together with the said heating plant so maintained, operated and controlled in connection with and as an integral part of the said building * * * so as not to endanger such members of the general public as were, then and there, in, upon and about the said premises either by the express or implied invitation of the said defendants and each of them; * * * that on the day * * * in question the (plaintiff) was, then and there, lawfully and rightfully in and upon the said premises and was, then and there, and at all times prior thereto, in the exercise of ordinary care for her own safety; and plaintiff avers that on the day * * * aforesaid, while she was so lawfully and rightfully in and upon the said premises, the said defendants and each of them, themselves or by their agents and servants in that behalf, wholly regardless of their duty in the premises, as aforesaid, so carelessly, negligently and improperly maintained, operated and controlled the said premises * * * and particularly the said heating plant so maintained, operated and controlled by the said defendants and each of them in connection with and as a necessary integral part of the premises * * * that by and through the negligence of the defendants and each of them, as aforesaid, and as a

direct and proximate result thereof, the said heating plant so located in and forming a necessary integral and competent part of the premises * * * was caused to and did explode and the plaintiff was, then and there, as a direct result and proximate cause, knocked down to and upon the floor, counters and other objects there with great force and violence and she thereupon, then and there, sustained severe and permanent injuries, both externally and internally," etc. "To the damage of the plaintiff," etc. The second count alleges that defendants Karavites and Gleavenites owned and possessed the building in question and participated in its maintenance, operation and heating; that defendant Kresge occupied a store in the building; that Karavites and Gleavenites entered into a lease with Kresge whereby the latter took over a portion of the building to be operated by it as a store; that Kresge, by reason of the said lease, took charge of the rebuilding, remodeling, replacing or placing of the heater, boiler or heating device, and the construction of a wall, covering or inclosure of the boiler, heater or heating plant in the basement; that thereafter the boiler or heating plant was maintained and operated by defendants and each of them for the purpose of furnishing heat to the building; that defendants and each of them negligently permitted the heating plant, wall and inclosure to be defective, worn out, out of repair, improperly operated, and in a dangerous condition, so that it was caused to explode, etc. The third count alleges that the owners, Karavites and Gleavenites entered into a lease with Kresge whereby the latter took over a portion of the building and agreed to and did take charge of the rebuilding, remodeling and replacing of a heater, boiler or heating device, wall, inclosure, etc.; that it became the duty of Kresge and the said owners to see that the heating plant was properly installed and constructed and

direct and proximate result thereof, the said heating plant so located in and forming a necessary integral and component part of the premises * * * was caused to and did explode and the plaintiff was, then and there, as a direct result and proximate cause, knocked down to and upon the floor, concrete and other objects there with great force and violence and he thereupon, then and there, sustained severe and permanent injuries, both externally and internally," etc. "To the damage of the plaintiff," etc. The second count alleges that defendants Kravitz and Glazerities owned and possessed the building in question and participated in the main tenance, operation and heating; that defendant Kravitz occupied a store in the building; that Kravitz and Glazerities entered into a lease with Kravitz whereby the latter took over a portion of the building to be operated by it as a store; that Kravitz, by reason of the said lease, took charge of the remodeling, remodeling, replacing or placing of the heater, boiler or heating device, and the construction of a wall, covering or inclosure of the boiler, heater or heating plant in the basement; that thereafter the boiler or heating plant was maintained and operated by defendants and each of them for the purpose of furnishing heat to the building; that defendants and each of them negligently permitted the heating plant, wall and inclosure to be defective, worn out, out of repair, improperly operated, and in a dangerous condition, so that it was caused to explode, etc. The third count alleges that the owners, Kravitz and Glazerities entered into a lease with Kravitz whereby the latter took over a portion of the building and agreed to and did take charge of the remodeling, remodeling and replacing of a heater, boiler or heating device, wall, inclosure, etc.; that it became the duty of Kravitz and the said owners to see that the heating plant was properly installed and constructed and

that it was not defective, etc., but that defendants and each of them so negligently constructed, installed, placed or remodeled the heating plant, etc., that it was in a dangerous condition, and as a result exploded, etc. Defendant Kresge filed a plea of not guilty, and two special pleas, the first of which denied the possession, maintenance and control of the building, and also denied the possession, maintenance, operation and control of the heating plant. The last special plea denies that it entered into a lease with the owners of the building whereby it took charge of the rebuilding, remodeling, replacing or placing the said heater, boiler, or heating device, as charged in plaintiff's declaration, and denies that it took charge of the rebuilding, remodeling or placing of the heating device, etc.

Defendant rented from the owners of the building Karavites and Gleavenites, part of the first floor of the building at the southwest corner of Crawford and West North avenues. It also occupied a room on the second floor, and a part of the basement for storage. There were other tenants in the building, all of whom rented directly from the owners and were not subtenants of Kresge. There was one other store on the first floor facing on North avenue, occupied by other tenants, and there were a few rooms and offices on the second floor. The evidence does not show how many tenants there were in the building. The heating plant for the entire building was located in the basement and was completely walled off from the portion of the basement used by Kresge. The only entrance to the plant was through a door located in the alley on the west side of the building. The heating plant was entirely inclosed by brick walls and it occupied a space approximately twenty feet square. As far as the evidence discloses the heating plant consisted of an oil burner, an oil tank, a boiler, and pipes

that it was not defective, etc., but that defendants and each of them so negligently constructed, installed, placed or maintained the heating plant, etc., that it was in a dangerous condition, and as a result exploded, etc. Defendant Kresge filed a plea of not guilty, and two special pleas, the first of which denied the possession, maintenance and control of the building, and also denied the possession, maintenance, operation and control of the heating plant. The last special plea denies that it entered into a lease with the owners of the building whereby it took charge of the rebuilding, remodeling, replacing or placing the hot water, boiler, or heating device, as charged in plaintiff's declaration, and denies that it took charge of the rebuilding, remodeling or placing of the heating device, etc.

Defendant rented from the owners of the building Karavites and Glavenites, part of the first floor of the building at the southwest corner of Crawford and West North avenues. It also occupied a room on the second floor, and a part of the basement for storage. There were other tenants in the building, all of whom rented directly from the owners and were not substants of Kresge. There was one other store on the first floor fronting on North avenue, occupied by other tenants, and there were a few rooms and offices on the second floor. The evidence does not show how many tenants there were in the building. The heating plant for the entire building was located in the basement and was completely walled off from the portion of the basement used by Kresge. The only entrance to the plant was through a door located in the alley on the west side of the building. The heating plant was entirely inclosed by brick walls and it occupied a space approximately twenty feet square. As far as the evidence discloses the heating plant consisted of an oil burner, an oil tank, a boiler, and pipes

running to radiators placed in the stores, offices, and rooms occupied by the several tenants. The only way Kresge could regulate the heat in the part of the premises occupied by it was by means of the control valves on the radiators.

Plaintiff entered the Kresge store for the purpose of purchasing some artificial flowers. She went to the rear of the store and while she was standing there an explosion occurred. The floor where plaintiff was standing was suddenly elevated a few inches, causing her to fall, and she was injured thereby. After a very careful examination of all of the evidence in the abstract we are unable to find any from which it could be definitely determined what exploded or the cause of the explosion. As the part of the store where plaintiff was standing at the time of the explosion was over the heating plant it might be a reasonable inference therefrom that the explosion occurred in the heating plant. While defendant strenuously contends that there is no evidence "showing what it was in this boiler room that exploded," it assumes in its argument in this court that "a blast or explosion occurred in the boiler room in the basement of the building." The Kresge store was opened for business on December 13, 1930, approximately four months before the accident. Prior to the opening some alterations were made in the building; those in the Kresge store were made by McLean Construction Company and certain alterations in the boiler room were made by Gallagher & Speck. There was an oil burner in the boiler room, which had been there for a considerable length of time before Kresge came, but some changes were made by Gallagher & Speck in connection with it, and they also installed a new boiler and some pipes.

Defendant contends that "the allegations of the declaration are specific and have not been proven by the evidence." This contention, in so far as it bears upon the second and third counts of the declaration, is undoubtedly good. These two counts are

running to radiators placed in the stores, offices, and rooms occupied by the several tenants. The only way Kresge could regulate the heat in the part of the premises occupied by it was by means of the control valves on the radiators.

Plaintiff entered the Kresge store for the purpose of purchasing some artificial flowers. He came to the rear of the store and while he was standing there an explosion occurred. The floor where plaintiff was standing was suddenly elevated a few inches, causing her to fall, and she was injured thereby. After a very careful examination of all of the evidence in the abstract we are unable to find any from which it could be definitely determined what exploded or the cause of the explosion. In the part of the store where plaintiff was standing at the time of the explosion was over the heating plant it might be a reasonable inference therefrom that the explosion occurred in the heating plant. While extraordinarily unlikely that there is no evidence showing what it was in this boiler room that exploded," it means in its argument in this court that "a plant or explosion occurred in the boiler room in the basement of the building." The Kresge store was opened for business on December 12, 1930, approximately four months before the accident. Prior to the opening some alterations were made in the building; these in the Kresge store were made by Sellman Construction Company and certain alterations in the boiler room were made by Gallagher & Speck. There was an oil burner in the boiler room, which had been there for a considerable length of time before the Kresge opened, but some changes were made by Gallagher & Speck in connection with it, and they also installed a new boiler and some pipes.

Defendant contends that "the mere claims of the defendants are specific and have not been proven by the evidence." This contention, in so far as it bears upon the proof of the cause of the declaration, is undoubtedly good. There is no conflict

predicated upon the theory that defendant entered into a lease with the owners of the building for the store, by the terms of which it agreed to and did take charge of the rebuilding, remodeling or placing of a certain heater, boiler or heating device and that thereafter said boiler, heater or heating plant was maintained and operated by defendant, etc. No evidence was introduced to show that defendant entered into such a lease. In fact, plaintiff, in her brief, practically concedes the point as to the ~~first~~ second and ~~second~~ third counts, but contends that "the allegations of the first count are not specific. This count is what is often called a general negligence count," and argues that one good count is sufficient to sustain the verdict and that there is evidence to sustain the material allegations of the first count.

"It is not necessary in actions ex delicto to prove all the allegations of the declaration. If plaintiff makes out a cause of action by proving the material allegations he is entitled to recover even though there be other averments of the declaration which are not proved. (Postal Telegraph-Cable Co. v. Likes, 225 Ill. 249; Dunham v. Black Diamond Coal Co., 239 id. 457.)" (Keivits v. Chicago Rapid Transit Co., 327 Ill. 207, 209. See also Weber Wagon Co. v. Kehl, 139 Ill. 644, 658; Devine v. Delano, 272 Ill. 166; Wood v. Illinois Cent. R. Co., 185 Ill. App. 180, 184; Flis v. City of Chicago, 247 Ill. App. 128.)

Applying that rule to the allegations of the first count and the evidence in the case: Defendant did not own the building and the evidence shows beyond all doubt that it did not control, maintain and operate the building, and it is clear that in order to recover under the first count it was necessary for plaintiff to show that defendant maintained, operated or controlled the heating plant in the basement and that it carelessly, negligently and improperly maintained, operated and controlled the heating plant, etc. Defendant contends that "the declaration in this case alleged charges of negligence in the installation, maintenance and operation of the heating plant, none of which charges of negligence were sustained by the evidence;" that the evidence shows that the owners of the building were the

predicated upon the theory that defendant entered into a lease with the owners of the building for the store, by the terms of which it agreed to and did take charge of the maintaining, remodeling or placing of a certain heater, boiler or heating device and that thereafter said boiler, heater or heating plant was maintained and operated by defendant, viz. No evidence was introduced to show that defendant entered into such a lease. In fact, plaintiff, in her brief, practically concedes the point as to the first and second counts, but contends that "the allegations of the first count are not specific. This count is what is often called a general negligence count," and argues that one good count is sufficient to sustain the verdict and that there is evidence to sustain the material allegations of the first count.

"It is not necessary in actions on policies to prove all the allegations of the declaration. If a material fact and a cause of action by proving the material allegations in a manner, however are, though there be other statements of the declaration which are not proved. (Central Illinois Light Co. v. City, 241 Ill. 240; Sullivan v. Illinois Central R. R. Co., 239 Ill. 477; Irwin v. Chicago & Alton Transit Co., 197 Ill. 97; Ins. Co. v. Wilson, 172 Ill. 62; Ins. Co. v. Kohl, 158 Ill. 66; Ins. Co. v. Wilson, 172 Ill. 62; Ins. Co. v. Pittsburg, Ft. W. & C. R. R. Co., 158 Ill. 160; Ins. Co. v. City of Chicago, 1 Ill. App. 1 Ill.)

Applying that rule to the allegations of the first count and the evidence in the case, [illegible] the evidence in the evidence above beyond all [illegible] and operate the building, [illegible] the first count it was necessary for plaintiff to show that defendant maintained, operated or controlled the heating plant in the basement and that it negligently, negligently and improperly maintained, operated and controlled the heating plant, etc. Defendant contends that the defendant relied on the [illegible] of evidence in the installation, maintenance and operation of the heating plant, none of which objections or negligence were established by the evidence, that the evidence shows that the owners of the building [illegible] the

owners of the entire heating plant and had the sole operation and control of it; that the explosion took place in a part of the premises not occupied nor rented by defendant, and that it did not own, manage, control nor operate the heating plant; and defendant strenuously contends that plaintiff failed to make out a prima facie case as to the material allegations in the declaration that it maintained, operated and controlled the heating plant. After a very careful examination of the evidence bearing upon the contention that plaintiff failed to make out a prima facie case as to the material allegations in the declaration that Kresge maintained, operated and controlled the heating plant, we do not believe that we would be warranted in sustaining this contention, although it must be conceded that plaintiff's evidence in regard thereto, especially when considered with the positive evidence to the contrary, is very weak and unsatisfactory. But the contention of defendant that the evidence shows beyond a doubt that the owners of the building and not defendant had the operation and control of the heating plant is clearly a meritorious one. As this case may be tried again we refrain from analyzing and commenting upon the facts and circumstances that have forced us to this conclusion, but we will say that we found it difficult to understand upon what theory the jury found for the plaintiff unless the first instruction given on behalf of plaintiff is responsible for the verdict.

Defendant strenuously contends that this instruction imposed a higher duty upon it than was required of it by the law and that the giving of the same constitutes reversible error. The instruction reads:

"The Court instructs the jury that a mercantile establishment open to the public for the transaction of business, impliedly invites all persons having business with such establishment to enter upon such premises, and impliedly warrants the premises to be reasonably safe for the business for which they are designed."

owners of the malts heating plant and had the sole operation and control of it; that the explosion took place in a part of the premises not occupied nor rented by defendant, and that it did not own, manage, control nor operate the heating plant; and defendant strenuously contends that plaintiff failed to make out a prima facie case as to the material allegations in the declaration that it maintained, operated and controlled the heating plant. After a very careful examination of the evidence bearing upon the contention that plaintiff failed to make out a prima facie case as to the material allegations in the declaration that Dwyer maintained, operated and controlled the heating plant, we do not believe that it could be warranted in sustaining this contention, although it must be conceded that plaintiff's evidence "bears thereon, especially when considered with the positive evidence to the contrary, is very weak and unsatisfactory. But the contention of defendant that the evidence alone beyond a doubt that the owners of the building and not defendant had the operation and control of the heating plant is clearly a mistaken one. A fair case may be drawn upon which to refrain from analyzing and commenting upon the facts and circumstances that have forced us to this conclusion, but we will say that we found it difficult to make out upon that theory the jury found for the plaintiff unless the first instruction given on behalf of plaintiff is responsible for the verdict.

Defendant strenuously contends that this instruction imposed a higher duty upon it than is given of it by the law and that the giving of the same constitutes reversible error. The instruction reads:

"The Court instructs the jury that a municipalities building open to the public for the transaction of business, implicitly invites all persons entering business with such corporation to enter upon such premises, and implicitly guarantee the premises to be reasonably safe for the business for which they are designed."

Defendant's contention is fully warranted. Plaintiff justifies the instruction by stating that it is based upon the language in the opinion of the court in the case of Reichmann v. Robertson's, Inc., 264 Ill. App. 537, wherein the court, in its opinion, said (p. 540):

> "Generally speaking, a mercantile establishment, open to the public for the transaction of business, impliedly invites all persons having business with such establishment to enter upon such premises, and impliedly warrants the premises to be reasonably safe for the purpose for which they are designed. Pauckner v. Wakem, 231 Ill. 276."

In Merkevich v. Atchison, T. & S. F. Ry. Co., 263 Ill. App. 1, 16, we said:

> "The defendant concedes that the instruction is an excerpt from the opinion of the court in Looney v. Metropolitan R. Co., 200 U. S. 480. Our Supreme Court, on a number of occasions, has commented upon the practice of converting sentences in the opinion of the court into instructions, and has held that it is a bad practice and one that often leads into serious error. The wisdom of this rule is well illustrated in the instant instruction."

The wisdom of this rule is also well illustrated in the instant case. In Reichmann v. Robterson's, Inc., supra, the court cites Pauckner v. Wakem, supra, in support of its statement of the law. That case is probably the leading case in Illinois on the subject, but the rule stated therein is not the rule stated by the Appellate court in the Reichmann case. The Supreme court in the Pauckner case laid down the rule that the owner of premises who expressly or impliedly invites another person to enter the premises for the transaction of business in which both are interested, owes to such person the duty to exercise ordinary care for his safety while upon the premises. That rule has been steadily followed in this state. O'Rourke v. Field & Co., 307 Ill. 197, 199, is a late case on the subject. See also Kaufman Department Stores v. Cranston, 258 Fed. 917, 918, and F. W. Woolworth Co. v. Williams, 41 Fed. (2d) 970, 972. Many other cases to the same effect might be cited.

As the evidence fails to show what exploded and why,

Defendant's contention is fully warranted. Justifiably the instruction by stating that it is based upon the law cited in the opinion of the court in the case of Delphman v. Robertson's, Inc., 206 Ill. App. 527, wherein the court, in its opinion, said (p. 540):

"Generally speaking, a mere public advertisement, open to the public for the transaction of business, impliedly invites all persons having business with such establishment to enter upon such premises, and impliedly warrants the premises to be reasonably safe for the purpose for which they are designed. Lunkenheimer v. Baker, 31 Ill. App."

In Kornkvich v. Stahlman, [illegible] Ill. App. 1, 16, we said:

"The defendant concedes that the instruction is an excerpt from the opinion of the court in Cooney v. Washington Co., 200 U. S. 489. Our supreme court, as a matter of course, has commented upon the practice of embodying excerpts in the opinion of the court into instructions, and has held that it is a pernicious and one that often leads into error. The wisdom of this rule is well illustrated in the instant instruction."

The wisdom of this rule is also well illustrated in the instant case. In Delphman v. Robertson's, Inc., supra, the court cited Lunkenheimer v. Baker, supra, in support of its statement of the law. That case is probably the leading case in Illinois on the subject, but the rule stated therein is not the rule stated by the appellate court in the Delphman case. The supreme court in the Lunkenheimer case laid down the rule that the owner of premises who expressly or impliedly invites another person to enter the premises for the transaction of business in which both are interested, owes a duty to exercise ordinary care for his safety while upon the premises. That rule has been directly followed in this state. [illegible] v. [illegible], 347 Ill. 127, 129, in a case cited on the subject. [illegible] Department Stores v. Cranston, 158 Ind. 321, 112 and [illegible] Co. v. Hillman, 61 Ind. (24) 270, 272. Many other cases to the same effect might be cited.

In the evidence fails to show what happened and why,

plaintiff and defendant have seen fit to argue the question as to whether or not the doctrine of res ipsa loquitur applies to the facts of this case. To invoke the doctrine of res ipsa loquitur it must appear that the agency causing the accident was under defendant's control. It is unnecessary to cite the many cases that sustain this well known rule of law. Plaintiff contends that there was sufficient evidence to warrant the jury in finding that defendant had control of the heating plant; defendant contends that the evidence proves, beyond a doubt, the contrary, and we have heretofore sustained defendant's contention in that regard. Under such a state of the evidence plaintiff cannot rely, in this court, upon the doctrine of res ipsa loquitur. However, plaintiff, in its brief, practically concedes that it does not rely upon that doctrine.

Plaintiff contends that "the defendant owed the plaintiff the duty to furnish her a reasonably safe place in which to transact business with it and that it failed to do so;" that "this suit was brought on the ground that the store of the defendant was unsafe and known to be so or by the exercise of reasonable care could have been known, to the defendant;" "that the defendant, who had its store in that building directly over the boiler, knew or ought to have known by reasonable diligence, that the boiler was not safe;" that plaintiff was not aware of the unsafe condition of the store and that, under such a state of facts, defendant will be required to answer for the consequences of its invitation. Plaintiff argues further that defendant would be bound even though it did not maintain, operate or control the heating plant. It would be a sufficient answer to the contention to say that such a theory of recovery is not warranted under the allegations of the declaration. However, we will consider the facts that bear upon the contention and argument. On November 29, 1930, before the defendant occupied the store, there had been a

plaintiff and defendant are seen fit to argue the question as to whether or not the doctrine of res ipsa loquitur applies to the facts of this case. To invoke the doctrine of res ipsa loquitur it must appear that the agency causing the injuries was under defendant's control. It is unnecessary to cite the many cases that contain this well known rule of law. Plaintiff contends that there was sufficient evidence to warrant the jury in finding that defendant had control of the heating plant; defendant contends that the evidence proves, beyond a doubt, the contrary, and we have heretofore mentioned defendant's contention in that regard. Under such a state of the evidence plaintiff cannot rely, in this court, upon the doctrine of res ipsa loquitur. However, plaintiff, in his brief, practically concedes that it does not rely upon that doctrine.

Plaintiff contends that "the defendant owed the plaintiff the duty to furnish her a reasonably safe place in which to transact business with it and that it failed to do so;" that this suit was brought on the ground that the acts of the defendant was unlawful and known to be so or by the exercise of reasonable care could have been known, to the defendant; "that the defendant, who had its agent in that building directly over the boiler, knew or ought to have known by reasonable diligence, that the boiler was not safe;" that plaintiff was not aware of the unsafe condition of the boiler and that, under such a state of facts, defendant will be required to answer for the consequences of its invitation. Plaintiff argues further that defendant could be found even though it did not maintain, operate or control the heating plant. It could be a sufficient answer to the contention to say that such a theory of recovery is not warranted under the allegations of the complaint. However, we will consider the facts that bear upon the contention and argument. On November 25, 1950, before the defendant occupied the store, there had been a

minor explosion, the nature or cause of which is not shown by the evidence. On December 26, 1930, after defendant opened its store, there was an explosion. Repairs were then made, not by defendant, on the oil burner and heating plant, which repairs were finished about January 2, 1931. The heating plant was operated by a janitor in the employ of the owners of the building. During the months of January, February and March, 1931, the heating plant was in good condition and working properly. On April 2, 1931, the explosion that caused the injury to plaintiff occurred. We find no reasonable basis in the evidence for the claim that the defendant knew or in the exercise of reasonable care could have known that the boiler or heating plant was unsafe.

We are satisfied that it would be an injustice to permit the present judgment to stand. The judgment of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Sullivan, P. J., and Gridley, J., concur.

minor explosion, the nature or cause of which is not shown by the evidence. On December 26, 1930, after defendant opened its store, there was an explosion. Repairs were then made, not by defendant, on the oil burner and heating plant, which repairs were finished about January 3, 1931. The heating plant was operated by a janitor in the employ of the owners of the building. During the months of January, February and March, 1931, the heating plant was in good condition and working properly. On April 2, 1931, the explosion that caused the injury to plaintiff occurred. I find no reasonable basis in the evidence for the claim that the defendant knew or in the exercise of reasonable care could have known that the boiler or heating plant was unsafe.

We are satisfied that it would be in bad form to permit the present judgment to stand. The judgment of the superior court of Cook county is reversed and the cause is remanded for a new trial.

EVIDENCE—NEGLIGENCE.

Sullivan, P. J., and Dryden, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS ex rel. OSCAR NELSON, Auditor of Public Accounts of the State of Illinois,

v.

ARLINGTON HEIGHTS STATE BANK, a Corporation.

MICHAEL OEFELEIN, Intervening Petitioner,

Appellee,

WALTER L. FLEW, Receiver, Respondent,

Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

275 I.A. 639

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

There was filed in the above case the intervening petition of Michael Oefelein, as guardian of the persons and estates of Kenneth Oefelein and Oscar Oefelein, minors. After the receiver had answered the chancellor found that the deposit made in the Arlington Heights State Bank by the intervening petitioner constituted a trust fund and ordered that the claim be allowed as a preferred claim. The receiver appeals.

The verified intervening petition recites: "That on the September 23, 1926, he (petitioner) was appointed guardian of the person and estate of Kenneth Oefelein and Oscar Oefelein, minors, by the Probate Court of Cook County, Illinois, and that he qualified as such guardian by furnishing bond as required by law, and that he is still the duly qualified and acting guardian of the estate of said

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MICHAEL OSTERLEIN, Intervening
Petitioner,

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APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

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There was filed in the above case the intervening petition of Michael Osterlein, as guardian of the persons and estates of Kenneth Osterlein and Oscar Osterlein, minors. After the receiver had answered the chancellor found that the deposit made in the Arlington Heights State Bank by the intervening petitioner constituted a trust fund and ordered that the claim be allowed as a preferred claim. The receiver appeals.

The verified intervening petition recites: "That on the September 23, 1926, he (petitioner) was appointed guardian of the person and estate of Kenneth Osterlein and Oscar Osterlein, minors, by the Probate Court of Cook County, Illinois, and that he qualified as such guardian by furnishing bond as required by law, and that he is still the duly qualified and acting guardian of the estate of said

minors; that there came to his hands as such guardian and as belonging to said minors certain sums of money amounting to $1673.69, which sums of money he deposited in the Arlington Heights State Bank, in a savings account as and under the name of 'Michael Oefelein, Guardian of the Person and Estate of Kenneth Oefelein and Oscar Oefelein, minors'; that the first deposit so made was made on November 1, 1926, and that savings deposit book No. 5274 of said bank was issued to the undersigned; that the undersigned continued to carry said savings deposit account in said bank up to and including the day said bank closed its doors and ceased to do business, on, to-wit, July 18, 1931; that at the time of the closing of said bank there was on deposit in said savings account to the credit of the undersigned as such guardian, the sum of $1532.48, all of which sum still remains due and unpaid, and that the undersigned has filed his claim as such guardian for said sum with the Receiver appointed for said bank. The undersigned further represents that said funds belonging to said minors as aforesaid were at the time of the deposit thereof in said bank, and still are, trust funds which are held by whomsoever may have custody thereof in trust for said minors; that said * * * Bank and its officers, directors, cashiers and employees knew at the time they accepted said funds for deposit that they belonged to said minors and were trust funds and the property of said minors; * * * that said bank, knowing the nature of said funds, accepted them for deposit and safekeeping, and that therefore the undersigned is entitled to a preference in the payment thereof. The undersigned therefore respectfully prays that an order may be entered in the above entitled cause establishing his claim as such guardian against the assets of said bank as a preferred claim and directing the receiver to make payment thereof in accordance with

minors; that there came to his hands as such guardian and as belonging to said minors certain sums of money amounting to $1672.65, which sums of money he deposited in the Arlington Heights State Bank, in a savings account as and under the name of 'Michael Ostafiuk, Guardian of the Person and Estate of Joseph Ostafiuk and Oscar Ostafiuk, minors'; that the first deposit so made was made on November 1, 1922, and that savings deposit book No. 3274 of said bank was issued to the undersigned; that the undersigned continued to carry said savings deposit account in said bank up to and including the day said bank closed its doors and ceased to do business, on, to-wit, July 13, 1931; that at the time of the closing of said bank there was on deposit in said savings account to the credit of the undersigned as such guardian, the sum of $1532.65, all of which sum still remains due and unpaid, and that the undersigned has filed his claim as such guardian for said sum with the Receiver appointed for said bank. The undersigned further represents that said funds belonging to said minors as aforesaid were at the time of the deposit thereof in said bank, and still are, trust funds which are held by whomsoever may have custody thereof in trust for said minors; that said * * * Bank and its officers, directors, cashiers and employees knew at the time they accepted said funds for deposit that they belonged to said minors and were trust funds and the property of said minors; * * * that said bank, knowing the nature of said funds, accepted them for deposit and safekeeping, and that therefore the undersigned is entitled to a preference in the payment thereof. The undersigned therefore respectfully prays that an order may be entered in the above entitled cause establishing his claim as such guardian against the assets of said bank as a preferred claim and directing the receiver to make payment thereof in accordance with

such finding as and when payments are to be made by said receiver from the funds of said bank."

The material part of the verified answer of the receiver is as follows: "* * * admits that at the closing of the Arlington * * * Bank on August 15, 1932, there was on deposit in said bank the sum of $1532.48 to the account of 'Michael Oefelein, Guardian;' denies that the said deposit in said Bank was a trust fund or that the claim hereinbefore filed by the said Michael Oefelein with the Receiver of the said * * * Bank is entitled to any preference over other general creditors of said bank."

The order appealed from reads as follows: "This cause coming on to be heard on the petition of Michael Oefelein, as guardian of the person and estate of Kenneth Oefelein and Oscar Oefelein, minors, praying that funds deposited by the petitioner, as such guardian, in the Arlington Heights State Bank, a banking corporation organized under the laws of the State of Illinois, which said bank closed its doors on July 18, 1931, and has since failed to do business, may be decreed to be a preferred claim against the estate and assets of said bank, and this cause coming also on to be heard upon the answer of Walter L. Plew, Receiver for said bank, and the Court being fully advised in the premises doth find that on September 23, 1926, the petitioner was appointed by the Probate Court of Cook County, Illinois, as the guardian of the person and estate of Kenneth Oefelein and Oscar Oefelein, minors, and that he qualified as such guardian and still is the duly qualified and acting guardian of the person and estate of said minors; that subsequent to his said appointment, and while said bank was doing a general banking business, as well as accepting deposits for savings accounts, said petitioner deposited various sums of money in said * * * Bank in a savings account in and under the name of Michael Oefelein, guardian of the

such finding as and when payments are to be made by said receiver from the funds of said bank."

The material part of the verified answer of the receiver is as follows: "* * * admits that at the closing of the Arlington * * * Bank on August 18, 1922, there was on deposit in said bank the sum of $1232.48 to the account of 'Michael Oefelein, Guardian;' denies that the said deposit in said Bank was a trust fund or that the claim heretofore filed by the said Michael Oefelein with the Receiver of the said * * * Bank is entitled to any preference over other general creditors of said bank."

The order appealed from reads as follows: "This cause coming on to be heard on the petition of Michael Oefelein, as guardian of the person and estate of Kenneth Oefelein and Oscar Oefelein, minors, praying that funds deposited by the petitioner, as such guardian, in the Arlington Heights State Bank, a banking corporation organized under the laws of the State of Illinois, which said bank closed its doors on July 18, 1921, and has since failed to do business, may be decreed to be a preferred claim against the estate and assets of said bank, and this cause coming also on to be heard upon the answer of Walter L. Pier, Receiver for said bank, and the Court being fully advised in the premises doth find that on September 22, 1924, the petitioner was appointed by the Probate Court of Cook County, Illinois, as the guardian of the person and estate of Kenneth Oefelein and Oscar Oefelein, minors, and that he qualified as such guardian and still is the duly qualified and acting guardian of the person and estate of said minors; that subsequent to his said appointment, and while said bank was doing a general banking business, as well as accepting deposits for savings accounts, said petitioner deposited various sums of money in said * * * bank in a savings account in and under the name of Michael Oefelein, guardian of the

person and estate of Kenneth Oefelein and Oscar Oefelein, minors, and that said bank issued its savings deposit book #5274 as evidence of such deposits; that on July 18, 1931, said * * * Bank closed its doors and ceased to do business, and that said bank has been closed ever since said last mentioned date; that afterwards Walter L. Flew was appointed receiver of the assets and estate of said bank and still is the acting and duly qualified receiver in charge of said bank; that at the time of the closing of said bank there was on deposit in said bank to the credit of the said Michael Oefelein, as such guardian, the sum of $1532.48; that said sums of money so deposited were at the time of such deposit by the said Michael Oefelein, as guardian as aforesaid, trust funds belonging to said minors, and were held by said Michael Oefelein, as trust funds in trust for said minors; that said * * * Bank, its officers, directors, cashiers and employees knew at the time said bank accepted said funds for deposit as aforesaid that they were the property of and belonged to said minors, and that they were trust funds in the hands of said guardian, and that said bank and its officers, directors, cashiers and employees accepted said funds for deposit and safekeeping, with full knowledge of their nature as aforesaid. It Is Therefore Ordered, Adjudged and Decreed that the petitioner, Michael Oefelein, as the Guardian of the person and estate of Kenneth Oefelein and Oscar Oefelein, is entitled to a preferred claim against the estate of said bank for the amount of such deposit hereinbefore set forth, and that said deposit be and the same is hereby decreed to be a preferred claim against the assets and estate of said bank, and It is Further Ordered that the receiver of said bank make payment of said claim in the amount of $1532.48, to the petitioner, in preference to general claims that may be filed and allowed against the estate of said bank. * * *" No certificate of evidence was filed in the

person and estate of Kenneth Oefelein and Conor Oefelein, minors, and that said bank issued its savings deposit book #8274 as evidence of such deposits; that on July 12, 1931, said * * * Bank closed its doors and ceased to do business, and that said bank has been closed ever since said last mentioned date; that afterwards Walter L. Pyle was appointed receiver of the assets and estate of said bank and still is the acting and duly qualified receiver in charge of said bank; that at the time of the closing of said bank there was on deposit in said bank to the credit of the said Michael Oefelein, as such guardian, the sum of $1832.48; that said sum of money so deposited were at the time of such deposit by the said Michael Oefelein, as guardian as aforesaid, trust funds belonging to said minors, and were held by said Michael Oefelein, as trust funds in trust for said minors; that said * * * Bank, its officers, directors, cashiers and employees knew at the time said bank accepted said funds for deposit as aforesaid that they were the property of and belonged to said minors, and that they were trust funds in the hands of said guardian, and that said bank and its officers, directors, cashiers and employees accepted said funds for deposit and safekeeping, with full knowledge of their nature as aforesaid. It is therefore Ordered, Adjudged and Decreed that the petitioner, Michael Oefelein, as the Guardian of the person and estate of Kenneth Oefelein and Conor Oefelein, is entitled to a preferred claim against the estate of said bank for the amount of such deposit hereinbefore set forth, and that said deposit so and the same is hereby decreed to be a preferred claim against the assets and estate of said bank, and it is Further Ordered that the receiver of said bank make payment of said claim in the amount of $1832.48, to the petitioner, in preference to general claims that may be filed and allowed against the estate of said bank. * * *" No certificate of evidence was filed in the

cause but the decretal order bears the O. K. of the solicitors for appellant and appellee.

"There are but two kinds of deposits: special and general. The former include those where the bank becomes a trustee for a depositor by special agreement or under circumstances sufficient to create a trust, and general deposits are those where the bank merely becomes the debtor of the depositor. As a rule, when money is deposited in a bank, title to such money passes to the bank. The bank becomes the debtor of the depositor to the extent of the deposit, and to that extent the depositor becomes the creditor of the bank. Such deposit then constitutes a part of the assets of the bank, and in case of insolvency of the bank that deposit belongs to the creditors of the bank in proportion to the amount of their respective claims. Well recognized exceptions to this rule are, first, where money or other thing is deposited with the understanding that that particular money or thing is to be returned to the depositor; second, where the money or thing deposited is to be used for a specifically designated purpose; and third, where the deposit itself was wrongful or unlawful. In the instant case the deposits made by plaintiff in error were known to be composed of school funds, but there was no request or direction on the part of the township treasurer to the bank that it should keep the funds separate from other money in the bank. The funds were placed in a savings account, and the fact that the bank agreed to, and did, pay interest upon the account tends to show the bank's privilege of using the money without restriction. The record discloses no agreement whatever between the bank and plaintiff in error as to keeping the funds intact or their use and application for any particular purpose. The mere fact that a depositor makes a deposit in a fiduciary rather than an individual capacity does not make the deposit a special one. An affix to the name of the depositor in an account with the bank indicating that he holds the funds in a fiduciary character, such as the word 'trustee,' 'agent,' 'guardian,' 'administrator,' or the like, does not itself render the deposit a special one as distinguished from a general deposit. Moneys deposited in an account kept in that form would be more readily traced, and the bank, perhaps, would be chargeable with notice of the source from which the depositor derived funds which he directed to be credited to him in that way, but the addition of such words does not operate to change the character of the deposit from a general to a special one. (3 R. C. L. sec. 147, p. 518.) The question between the depositor and the bank is not what relation the depositor or his fund bears to some third party, but rather whether a trust relation has been created between the bank and the depositor in connection with the fund. In order to make a deposit a special one the bank must be made an agent rather than a debtor, and its agency or trusteeship cannot be created by mere external relationship of the debtor unless the deposit is wrongful or the law forbids the bank becoming a debtor." (The People v. Farmers State Bank, 338 Ill. 134, 137-8. Italics ours.)

"A fiduciary may deposit trust funds as a general deposit. The fact that the funds so deposited are trust funds and known by the bank to be so does not make the deposit special. In the absence of evidence making it a special deposit the depositor simply becomes a creditor of the bank, standing upon the same footing as other general creditors and entitled to no preference,

cause but the decretal order bears the n. d. of the relation for appellant and appellee.

"There are but two kinds of deposits: special and general. The former include those where the bank becomes a trustee for a depositor by special agreement or under circumstances sufficient to create a trust, and general deposits are those where the bank merely becomes the debtor of the depositor. In a trust, when money is deposited in a bank, title to such money passes to the bank. The bank becomes the debtor of the depositor to the extent of his deposit, and so that extent the depositor becomes the creditor of the bank. Such deposit then constitutes a part of the assets of the bank, and in case of insolvency of the bank that deposit belongs to the creditors of the bank in proportion to the amount of their respective claims. Well recognized exceptions to this rule are: First, where money or other things are deposited with the understanding that that particular money or thing is to be returned to the depositor; second, where the money or thing deposited is to be used for a specific purpose and not mixed with other funds; third, where the deposit itself was not of money. In the instant case the deposits made by Pitts in fact in error were found to be composed of robbed funds, but there was no request or direction on the part of the trustee the bankers to the bank that it should keep the funds separate from other money in the bank. The funds were placed in a savings account, on the fact that the bank agreed to, and did, pay interest upon the account funds to whom the bank's privilege of using the money without interest. The record discloses no agreement whatever between the bank and plaintiff in error as to be paid the time interest or this was and application to any particular purpose. The mere fact that a depositor makes a deposit in a fiduciary capacity rather than an individual capacity does not make the deposit a special one. In the name of the depositor in an account with the bank indicating that he holds the funds in a fiduciary capacity, such as the word 'trustee,' 'agent,' 'executor,' 'administrator,' or the like, does not itself render the deposit a special one as distinguished from a general deposit. Money deposited in an account kept in that form would be more readily traced, and the bank, perhaps, would be chargeable with notice of the source from which the depositor derived funds which he stated to be entitled to him in that way, but the addition of such words does not operate to change the character of the deposit from a general to a special one. (3 R. C. L. sec. 147, p. 510.) The relation between the depositor and the bank is not what with the depositor or his from bonds to some third party, but rather whether a trust relation has been created between the bank and the depositor in connection with the fund. In order to make a deposit a special one, the bank must be made an agent rather than a debtor, and the agency of a bank only cannot be created by the general relationship of the depositor unless the deposit is wrongful or the law imposes the bank responsibility a debtor." (The Tonka v. Bank, 2 Okla. 3, 10 L. R. A. 1.)

"Fiduciary and deposits trust. Under a general deposit The fact that the funds to Pitts are trust funds are known by the bank so to do does not make the deposit special. In the absence of evidence making it a special deposit the depositor simply becomes a creditor of the bank, resulting upon the same footing as other general creditors and entitled to no preference.

the bank simply becoming indebted to him in his representative capacity. (Paul v. Draper, 158 Mo. 197; Officer v. Officer, supra.) The depositor may be described in the pass-book, certificate or receipt which evidences his deposit, as a trustee, executor, administrator, guardian, agent, treasurer, manager, or by some other word or words indicating his fiduciary character, but this will not, alone, render the deposit special. (Paul v. Draper, supra; Officer v. Officer, supra; Thompson v. Orchard State Bank, 76 Colo. 20; Gray v. Elliott, 36 Wyo. 361; Pethybridge v. First State Bank, 75 Mont. 173.) 'When deposits are received, unless they are special deposits, they belong to the bank as a part of its general funds and the relation of debtor and creditor arises between the bank and the depositor. This is equally so whether the deposit is of trust moneys or funds which are impressed with no trust, provided the act of depositing is no misappropriation of the fund.' (Fletcher v. Sharpe, 108 Ind. 276.) Where public funds are deposited by an officer having the custody of them to his credit as such officer, not as a special deposit, the money deposited becomes the money of the bank, and the officer is entitled to no priority of payment because of the public character of the funds. (Otis v. Gross, supra; Phillips v. Gillis, 98 Kan. 383; Smith v. Arnold, 165 Ky. 214; Brown v. Sheldon State Bank, 117 N. W. (Iowa) 289; Alston v. State, supra.)" (The People v. Home State Bank, 338 Ill. 179, 183-4. Italics ours.)

Appellee concedes that under the allegations in his petition and the findings in the order the deposit was not one by which the bank became a trustee by special agreement, nor was it a fund deposited to be used for a specifically designated purpose. His sole contention is that under the facts alleged in the petition and found by the chancellor, and the law governing the same, the deposit itself was wrongful or unlawful, and that therefore the bank in accepting the deposit became liable therefor as trustee. In support of this contention appellee cites section 22, ch. 64 (Guardian and Ward), Cahill's Ill. Rev. St., 1933, the pertinent portion of which reads as follows:

"It shall be the duty of the guardian to put and keep his ward's money at interest upon security to be approved by the court, or by investing, on approval of the court, the same in United States bonds, or in the bonds of any county or city which are not issued in aid of railroads, and where the laws do not permit said counties or cities to become indebted in excess of five per cent of the assessed valuation of property for taxation therein, and where the total indebtedness of such county or city does not exceed five per cent of the assessed valuation of property for taxation at the time of such investment."

Appellee concedes that the Guardian and Ward act "does not make any

the bank simply becoming indebted to him in his trust capacity. (Saul v. Draper, 168 Mo. 197; Officer v. Officer, supra.) The deposition may be described in the pass-book, certificate or receipt which evidences his deposit, as a trustee, executor, administrator, guardian, agent, treasurer, manager, or by some other word or words indicating his fiduciary character, but this will not, alone, render the deposit special. (Saul v. Draper, supra; Officer v. Officer, supra; Hamman v. Orchard State Bank, 76 Ore. 29; Gray v. Willett, 34 Wyo. 361; Pettybridge v. First State Bank, 75 Mont. 175.) When deposits are received, unless they are special deposits, they belong to the bank as a part of its general funds and the relation of debtor and creditor arises between the bank and the depositor. This is usually so whether the deposit is of trust moneys or funds which are impressed with no trust, provided the act of depositing is no misappropriation of the fund.' (Fletcher v. Dupree, 168 Ind. 276.) Where public funds are deposited by an officer having the custody of them to his credit as such officer, not as a special deposit, the money deposited becomes the money of the bank, and the officer is entitled to no priority of payment because of the public character of the funds. (Otis v. Gross, supra; Phillips v. Orville, 98 Kan. 384; Walsh v. Kendall, 188 Ky. 314; Brown v. Madison State Bank, 117 N. Y. (Iowa, 800); Allston v. State, supra.) (The People v. Home State Bank, 358 Ill. 1, 7, 192-4. Italics ours.)

Appellee concedes that under the allegations in his petition and the findings in the case the deposit was not one by which the bank became a trustee by special agreement, nor was it a fund deposited to be used for a specifically contemplated purpose. His sole contention is that under the facts alleged in his petition and found by the chancellor, and the law governing the case, the deposit itself was wrongful or unlawful, and that thereby the bank in receiving the deposit became liable therefor as trustee. In support of this contention appellee cites section 8 , ch. 64 (Construction and Trust), Cahill's Ill. Rev. Stat., 1923, the pertinent portion of which is as follows:

> "It shall be the duty of the trustee to pay over the trust money, his wards's money or interest upon security to be approved by the court, or by investing, on approval of the court, in the United States bonds, or in the bonds of any county or city which are not in default in all of principle and interest, but it is not parties with counties or cities to become indebted in excess of five per cent of the [illegible] for taxation therein, and where the total indebtedness of such county or city does not exceed five per cent of the [illegible] valuation of property for taxation as the time of such investment."

Appellee concedes that the Guardian and ward act "does not make any

provision for the deposit in a bank by a guardian of funds belonging to his ward," but he argues that "if he does so (deposit) for any reason he is still charged with their custody and safekeeping. * * * The provision of the statute is a limitation upon the powers of the guardian in dealing with his ward's funds and is binding on anyone who accepts funds from a guardian knowing their character;" that section 22 by implication, prohibits a guardian from depositing guardianship funds in a bank and that, therefore, the deposits in question were unlawful and the bank in accepting the deposits became liable therefor as a trustee. After a very careful consideration of section 22 we are forced to the conclusion that it does not directly nor by implication prohibit a guardian from making a deposit of the funds in his possession in a bank. In the absence of a prohibitive statute "a fiduciary may deposit trust funds as a general deposit." (The People v. Home State Bank, supra, p. 183.) The mere fact that the guardian in the instant case was still charged with the custody and safe-keeping of the funds, after he had made the deposit, would not cause the deposit to become a special one. The People v. State Bank of Maywood, 354 Ill. 519, cited by appellee, does not aid us in our interpretation of section 22. People ex rel. Nelson v. Citizens Tr. & Sav. Bank, 272 Ill. App. 444, recently decided by this division of the court, has no bearing upon the instant case. There it was stipulated that the deposit was made by the administrator under section 2 of the so-called Trust Companies Act (Cahill's St. ch. 32) in order that he might secure his discharge as administrator; that the bank had full knowledge that the money was being deposited pursuant to the order of the Probate court in the matter of the estate of Fay Sommers, deceased, and that it was deposited subject to the order of said court; that the deposit was made by the administrator for the purpose of securing his discharge as such administrator and

provision for the deposit in a bank by a guardian of funds belonging to his ward," but he argues that "if he does so (deposit) for any reason he is still charged with their custody and safekeeping. * * * The provision of the statute is a limitation upon the powers of the guardian in dealing with his ward's funds and is binding on anyone who receives funds from a guardian knowing their character;" that section 32 by implication, prohibits a guardian from depositing guardianship funds in a bank and that, therefore, the deposits in question were unlawful and the bank in accepting the deposits became liable therefor as a trustee. After a very careful consideration of section 32 we are forced to the conclusion that it does not directly nor by implication prohibit a guardian from making a deposit of the funds in his possession in a bank. In the absence of a prohibitive statute "a fiduciary may deposit trust funds in a general deposit." (The People v. Home State Bank, supra, p. 122.) The mere fact that the guardian in the instant case was still charged with the custody and safe-keeping of the funds, after he had made the deposit, would not cause the deposit to become a special one. The People v. State Bank of Maywood, 334 Ill. 316, also by implication, does not aid us in our interpretation of section 32. People ex rel. Kelman v. Citizens Tr. & Sav. Bank, 272 Ill. 490, 444, recently decided by this division of the court, has no bearing upon the instant case. There it was stipulated that the deposit was made by the administrator under section 2 of the so-called trust companies act (Ill. R. S. ch. 32) in order that he might secure his discharge as administrator; that the bank had full knowledge that the money was being deposited pursuant to the order of the Probate court in the matter of the estate of Fay Jones, deceased, and that it was deposited subject to the order of said court; that the deposit was made by the administrator for the purpose of securing his discharge as such administrator and

that when the administrator made his report to the court that the deposit had been made he would be discharged by the court as such administrator, and we held, under the stipulated facts, that when the bank accepted the deposit it accepted it as a trust company and not as a bank. In the instant case there is no contention that the deposit was made under section 2 of the Trust Companies Act. In fact, appellee, in his brief, contends that after the making of the deposit he was still charged with its custody and safe-keeping.

After a very careful consideration of the question involved in the instant appeal we have reached the conclusion that the order appealed from must be reversed, but we are of the opinion that justice will be best served by affording to the intervening petitioner a further opportunity to show, if he can, that the fund in question constituted a trust fund.

The order of the Circuit court of Cook county is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Sullivan, P. J., and Gridley, J., concur.

that when the administrator made his report to the court that the deposit had been made he could be discharged by the court as an administrator, and we hold, under the stipulated facts, that when the bank accepted the deposit it so opted it as a trust company and not as a bank. In the instant case there is no contention that the deposit was made under section 2 of the trust companies act. In fact, appellee, in his brief, contends that after the making of the deposit he was still charged with its custody and safe-keeping.

After a very careful consideration of the question involved in the instant appeal we have reached the conclusion that the order appealed from must be reversed, but we are of the opinion that justice will be best served by affording to the intervening petitioner a further opportunity to show, if he can, that the fund in question constituted a trust fund.

The order of the circuit court of Cook county is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Sullivan, P. J., and Gridley, J., concur.

37158

JACOB N. MAEHL et al.,
Appellees,

v.

LEW L. BALCH et al.
Defendants.

ETHEL M. BALCH et al.,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

275 I.A. 640

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying a motion of appellants, defendants in the court below, that they be given leave to file their appearance and the appearance of their solicitor, that a decree of foreclosure and sale heretofore entered in the said cause be vacated, and that they be given leave to defend.

The decree of foreclosure and sale in the cause was entered on December 23, 1932, and a deficiency decree in the amount of $3,397.97 was entered on February 7, 1933, against appellants Lew L. Balch and Ethel M. Balch, his wife, and Milton H. Balch and Lena Balch, his wife. Service by publication was had against these appellants. The material parts of the affidavit for publication notice are as follows: That the defendants Ethel M. Balch, Milton H. Balch, individually and as trustee under trust agreement recorded as Document No. 9440105, Lena Balch, and J. H. Balch, trustee under trust agreement recorded as Document No. 9440105, reside or have gone out of this state and on due inquiry cannot be found, or are concealed within this state so that

37158

JACOB M. MANN et al.,
Appellees,

v.

LEW I. BALOH et al.,
Defendants.

ETHEL M. BALOH et al.,
Appellants.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

2½ I.A. 640

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying a motion of appellants, defendants in the court below, that they be given leave to file their appearance and the appearance of their solicitor, that a decree of foreclosure and sale heretofore entered in the said cause be vacated, and that they be given leave to defend.

The decree of foreclosure and sale in the cause was entered on December 23, 1932, and a deficiency decree in the amount of $3,397.97 was entered on February 7, 1933, against appellants Lew I. Baloh and Ethel M. Baloh, his wife, and Milton H. Baloh and Lena Baloh, his wife. Service by publication was had against these appellants. The material parts of the affidavit for publication notice are as follows: That the defendants Ethel M. Baloh, Milton H. Baloh, individually and as trustee under trust agreement recorded as Document No. 9440105, Lena Baloh, and L. H. Baloh, trustee under trust agreement recorded as Document No. 9440105, reside or have gone out of this state and on due inquiry cannot be found, or are concealed within this state so that

service of process cannot be had upon them or any of them; that the last known address of Ethel M. Balch was 6728 Oglesby avenue; that the last known address of Milton H. Balch, trustee, was 2333 South Michigan avenue; that the last known address of Lena Balch was 2333 South Michigan avenue, and that the last known address of J. H. Balch, trustee, was 2333 South Michigan avenue, Chicago, Illinois; "affiant further states that he has made due and diligent search and inquiry to ascertain the present place or places of residence of said defendants and each of them, but has been unable to ascertain same, and that upon due and diligent search and inquiry, the present place or places of residence of the above described defendants and each of them, cannot be ascertained." There was afterwards filed a certificate, by the clerk of the court, of mailing copies of publication notice to the appellants, the address as to each being the same as that stated in the said affidavit. There was also filed a publisher's certificate of notice. An order of default was thereafter entered as to each of the appellants, the order reciting that each had been duly notified of the pendency of the cause by publication of notice and by mailing the same to them pursuant to the statute.

The return of the chancery summons shows service on defendants James R. Ball, Eugene M. Darch and Lew L. Balch, as trustee under Document No. 9642287; "the other defendants not found." Although the summons was returned not found as to Lew L. Balch, the order of default finds that personal service was had upon him individually and as trustee. While the affidavit of nonresidence does not make out a prima facie showing as to the nonresidence of Lew L. Balch, the order of default finds that he was duly notified of the pendency of the cause by publication of notice and by mailing

service of process cannot be had upon them or any of them; that the last known address of Ethel M. Balch was 6728 Ogleby avenue; that the last known address of Milton H. Balch, trustee, was 2333 South Michigan avenue; that the last known address of Lena Balch was 2333 South Michigan avenue, and that the last known address of I. H. Balch, trustee, was 2333 South Michigan avenue, Chicago, Illinois; affiant further states that he has made due and diligent search and inquiry to ascertain the present place or places of residence of said defendants and each of them, but has been unable to ascertain same, and that upon due and diligent search and inquiry, the present place or places of residence of the above described defendants and each of them, cannot be ascertained."

There was afterwards filed a certificate, by the clerk of the court, of mailing copies of publication notice to the appellants, the address as to each being the same as that stated in the said affidavit. There was also filed a publisher's certificate of notice. An order of default was thereafter entered as to each of the appellants, the order recitting that each had been duly notified of the pendency of the cause by publication of notice and by mailing the same to them pursuant to the statute.

The return of the chancery summons shows service on defendants James R. Ball, Eugene M. Daroh and Lew I. Balch, as trustee under Document No. 9642287; "the other defendants not found." Although the summons was returned not found as to Lew I. Balch, the order of default finds that personal service was had upon him individually and as trustee. While the affidavit of nonresidence does not make out a prima facie showing as to the nonresidence of Lew I. Balch, the order of default finds that he was duly notified of the pendency of the cause by publication of notice and by mailing

the same to him pursuant to statute. A deficiency decree was entered against appellants Lew L. Balch and Ethel M. Balch, his wife, and Milton H. Balch and Lena Balch, his wife, although the record shows service only by publication as to them. The appellees concede, of course, that the court was without jurisdiction to enter this personal judgment against said appellants, but they argue that this deficiency judgment is void on the face of the record and it is unnecessary to amend the decree in that regard.

The motion of appellants, filed June 16, 1933, is as follows:

"Now come the following named defendants to the above entitled cause, towit: Ethel M. Balch, Milton H. Balch and Lena Balch, his wife, Lew L. Balch, Trustee under the Trust deed recorded as Document number 9642287 and of Lew L. Balch, Milton H. Balch and J. H. Balch as Trustees under the Trust Agreement, dated October 10, 1926, and recorded as Document number 9440105, and as such Trustees the holders and owners of the unpaid note and interest notes secured by Trust Deed recorded as Document number 9642287, who were made parties defendant in this suit as 'Unknown Owners', and move the court that leave be given to them and each of them to file their and each of their appearance and the appearance of Jacob G. Grossberg as their solicitor in this cause, and that the decree of foreclosure and sale entered in this cause on the 23d day of December, 1932 at the December 1932 term of this court, may be vacated and that leave be given to the said defendants and each of them to answer the bill of complaint herein filed and in support of such motions, they, the aforesaid moving defendants herewith present and tender to the court a notice with proof of service thereof and affidavit hereto attached, etc."

In support of the motion there was filed the following affidavit:

"Jack H. Balch, residing at 1116 East 48th Street, in the City of Chicago, County of Cook and State of Illinois, being first duly sworn, on oath says that he is one of the defendants in the above entitled cause and described in the proceeding herein as one of the Trustees under Trust Agreement, dated October 10, 1926, and recorded as Document Number 9440105; that he is a brother of Lew L. Balch and of Milton H. Balch, two other defendants in the said cause; that Ethel M. Balch, another defendant, is the wife of the said Lew L. Balch and has been married to the said Lew L. Balch and residing with him for fourteen years last past; and Lena Balch is the wife of the said Milton H. Balch, who has been married to the said Milton H. Balch and living with him for twenty-two years last past; that all of these foregoing named defendants, towit: this affiant and the said Milton H. Balch, Lew L. Balch, Ethel M. Balch and Lena Balch, have been continuously residing in the City of Chicago, County of Cook and State of Illinois, for at least seven years last past; that the residence of the said Lew L.

the same to him pursuant to statute. A deficiency decree was entered against appellants Leo L. Balch and Ethel M. Balch, his wife, and Milton H. Balch and Lena Balch, his wife, although the record shows service only by publication as to them. The appellees concede, of course, that the court was without jurisdiction to enter this personal judgment against said appellants, but they argue that this deficiency judgment is void on the face of the record and it is unnecessary to amend the decree in that regard.

The motion of appellants, filed June 16, 1933, is as follows:

"Now come the following named defendants to the above entitled cause, to-wit: Ethel M. Balch, Milton H. Balch and Lena Balch, his wife, Leo L. Balch, Trustee under the Trust deed recorded as Document number 9642327 and of Leo L. Balch, Milton H. Balch and L. H. Balch as Trustees under the Trust agreement, dated October 10, 1926, and recorded as Document number 9640105, and as such Trustees the holders and owners of the unpaid note and interest notes secured by Trust deed recorded as Document number 9642327, who were made parties defendant in this suit as 'Unknown Owners', and move the court that leave be given to them and each of them to file their and each of their appearance and the appearance of Jacob G. Gronberg as their solicitor in this cause, and that the decree of foreclosure and sale entered in this cause on the 23d day of December, 1932 at the December 1932 term of this court, may be vacated and that leave be given to the said defendants and each of them to answer the bill of complaint herein filed and in support of such motions, they, the aforesaid moving defendants herewith present and tender to the court a notice with proof of service thereof and affidavit hereto attached, etc."

In support of the motion there was filed the following affidavit:

"Jack H. Balch, residing at 1112 West 68th Street, in the City of Chicago, County of Cook and State of Illinois, being first duly sworn, on oath says that he is one of the defendants in the above entitled cause and described in the proceeding herein as one of the Trustees under Trust Agreement, dated October 10, 1926, and recorded as Document Number 9640105; that he is a brother of Leo L. Balch and of Milton H. Balch, two other defendants in the said cause; that Ethel M. Balch, another defendant, is the wife of the said Leo L. Balch and has been married to the said Leo L. Balch and residing with him for fourteen years last past; and Lena Balch is the wife of the said Milton H. Balch, who has been married to the said Milton H. Balch and living with him for twenty-two years last past; that all of these foregoing named defendants, towit: this affiant and the said Milton H. Balch, Leo L. Balch, Ethel M. Balch and Lena Balch, have been continuously residing in the City of Chicago, County of Cook and State of Illinois, for at least seven years last past; that the residence of the said Leo L.

Balch and Ethel M. Balch was continuously from about the 1st day of May, 1932 until about the 29th day of May, 1933 at 7721 Phillips Avenue in the said City of Chicago and thereafter and since then and now is at 2554 E. 76th Street, in the said City of Chicago and the residence of the said Milton H. Balch and Lena Balch was continuously from about the 1st day of May, 1932 to about the 20th day of April, 1933 at the Mayfair Hotel at the Northwest Corner of Hyde Park Boulevard and Fifty-fifth Street, Chicago, Illinois, and thereafter and since then and now is at 5336 Woodlawn Avenue, in the said City of Chicago; that the residence of this affiant was continuously since the 1st day of May, 1932 and until the 15th day of May, 1933 at number 7130 Cyril Avenue in the said City of Chicago, and thereafter and since then and now is at 1116 East 48th Street in the said City of Chicago; that neither of the defendants whose places of residence are hereinabove stated has been concealed within this State so that service of process could not be had upon them or either of them.

"This affiant further says that the complainant, Jacob Nicholas Maehl, has for at least three or four years last past been in contact with the several defendants named in this affidavit and has been entirely familiar with the fact that during all such time they and each of them have been residents of the said City, County and State and that their places of residence as aforesaid could have been ascertained upon the slightest inquiry.

"This affiant further says that at no time has number 2333 South Michigan Avenue, Chicago, Illinois, been the address of any of the defendants, whose places of residence are given in this affidavit excepting only that of this affiant, whose place of business has been at said address for fifteen years last past. * * *"

Appellees seek to justify the action of the chancellor in the overruling of appellants' motion upon the ground that the only procedure to vacate a decree of foreclosure and sale is section 19, chapter 22, of the Revised Statutes and that appellants failed to follow the procedure specifically set forth therein. In support of this position appellees have argued at some length the procedure that must be followed under section 19 and the alleged failure of appellants to follow the strict requirements of the section. On the other hand, appellants state that their motion is not based upon section 19, "but upon the ground that the alleged jurisdiction of the court to enter the decree was based upon a false and fraudulent affidavit for publication, and that the decree is wholly void; * * * that the application to vacate the decree and leave to defend was not addressed to any discretion or supposed discretion of the court,

Bolch and Ethel M. Bolch were continuously from about the 1st day of May, 1932 until about the 25th day of May, 1932 at 7701 Cottlitpu Avenue in the said City of Chicago and thereafter and since then and now is at 2324 S. 70th street, in the said City of Chicago and the residence of the said William H. Bolch and Ethel Bolch was continuously from about the 1st day of May, 1932 to about the 30th day of April, 1934 at the Mayfair Hotel at the Northeast corner of Hyde Park Boulevard and Fifty-fifth street, Chicago, Illinois, and thereafter and since then and now is at 6336 Woodlawn Avenue, in the said City of Chicago; that the residence of this affiant was continuously since the 1st day of May, 1932 and until the 15th day of May, 1932 at number 7130 Yuma Avenue in the said City of Chicago, and thereafter and since then and now is at 1112 West 65th street in the said City of Chicago; that neither of the defendants whose places of residence are hereinbefore stated has been concealed within this State so that service of process could not be had upon them or either of them.

"This affiant further says that the complainant, Jacob Nicholas Mesh, has for at least three or four years last past been in contact with the several defendants named in this affidavit and has been entirely familiar with the fact that they during all such time they and each of them have been residents of the City of Chicago and State and that their places of residence as aforesaid could have been ascertained upon the slightest inquiry.

"This affiant further says that at the time the number 3323 South Michigan Avenue, Chicago, Illinois, or in the address of any of the defendants, whose places of residence are given in this affidavit excepting only that of this affiant, whose place of business has been at said address for fifteen years last past.
* * *"

Appellees seek to justify the action of the chancellor in the overruling of appellants' motion upon the ground that the only procedure to vacate a decree of dissolution and sale is section 19, chapter 22, of the Revised Statutes and that appellants failed to follow the procedure specifically set forth therein. In support of this position appellees have argued at some length the procedure that must be followed under section 19 and the alleged failure of appellants to follow the strict requirements of the section. On the other hand, appellants state that their motion is not based upon section 19, "but upon the ground that the alleged jurisdiction of the court to enter the decree was based upon a false and fraudulent affidavit for publication, and that the decree is void; * * * that the application to vacate the decree and leave to defend was not addressed to any discretion or supposed discretion of the court,

but was a matter of right."

In Graham v. O'Connor, 350 Ill. 36, where it was claimed that the allegations in certain affidavits filed for the purpose of giving notice by publication were false, the court said (pp. 40-1):

"To secure jurisdiction over unknown parties by constructive service through publication is a concession of the law to the hard circumstance of necessity. The statute is particular in enumerating the necessary steps. The phrases 'due inquiry' and 'diligent inquiry' in that statute are not intended as useless phrases but are put there for a purpose. Those two phrases have a well understood meaning that cannot be reconciled with the taking of a chance or guessing that the names and addresses of unknown parties can not be ascertained. A perfunctory inquiry does not comply with the provisions of the statute. An honest and well directed effort must be made to ascertain the names and addresses of unknown parties. The inquiry must be as full as the circumstances of the particular situation will permit. In this case the evidence shows that the defendant was a real estate dealer and at the time she obtained her tax deed was employed in the office of the county clerk of Winnebago county. The record shows she is a person of more than average intelligence, and we are warranted in assuming that she understood the importance and relation of public records to land titles. It is clear that the defendant fell far short of making the 'due inquiry' and 'diligent inquiry' required by the statute. Consequently her affidavits did not speak the truth. It necessarily follows that the court did not acquire jurisdiction over the complainants by constructive service based upon false affidavits. So far as these complainants are concerned, all proceedings had in the defendant's action with relation to the land in question are null and void and do not foreclose the complainants from bringing their suit to quiet title. The decree so obtained may be set aside at any time thereafter on the discovery of fraud. (Busby v. Maus, 294 Ill. 401.) Section 19 of the Chancery act does not apply here, as it applies only to those cases where the court acquires jurisdiction, and where, as a matter of fact, unknown parties are properly made parties to the action." (Italics ours.)

It is evident that section 19 was intended to give an additional remedy and not to limit or take away those already in existence, and it is exceedingly doubtful if the section was intended to apply to a case like the instant one. In Zandstra v. Zandstra, 266 Ill. App. 293, the court quotes with approval (pp. 297-302) certain cases that support the position of appellants. Edson v. Edson, 108 Mass. 590, reviewed in the Zandstra case, seems to be a leading authority upon the subject. It is a general rule that a court has power to vacate a judgment at any time after the expiration of the term where the court was without jurisdiction

but was a matter of right."

In Graham v. O'Connor, 280 Ill. 36, where it was claimed that the allegations in certain affidavits filed for the purpose of giving notice by publication were false, the court said (pp. 40-41):

"To secure jurisdiction over unknown parties by constructive service through publication is a concession of the law to the hard circumstance of necessity. The statute is particular in enumerating the necessary steps. The phrase 'due inquiry' and 'diligent inquiry' in that statute are not intended as useless phrases but are put there for a purpose. These two phrases have a well understood meaning that cannot be reconciled with the taking of a chance or guessing that the name and whereabouts of unknown parties can not be ascertained. A perfunctory inquiry does not comply with the provisions of the statute. An honest and well directed effort must be made to ascertain the names and addresses of unknown parties. The inquiry must be as full as the circumstances of the particular situation will permit. In this case the evidence shows that the defendant was a real estate dealer and at the time she obtained her job she was employed in the office of the county clerk of Winnebago county. The record shows she is a person of more than average intelligence, and we are warranted in assuming that she understands the importance and relation of public records to land titles. It is clear that the defendant fell far short of making the 'due inquiry' and 'diligent inquiry' required by the statute. Consequently her affidavits did not speak the truth. It necessarily follows that the court did not acquire jurisdiction over the complainants by constructive service based upon false affidavits. So far as these complainants are concerned, all proceedings had in the defendant's action with relation to the land in question are null and void and do not foreclose the complainants from bringing their suit to quiet title. The decree no obtained may be set aside at any time thereafter on the discovery of fraud. (Busby v. Lynn, 164 Ill. 401.) Section 19 of the Chancery act does not apply here, as it is plain that in those cases where the court so acquires jurisdiction, and where, as a matter of fact, unknown parties are properly made parties to the action." (Italics ours.)

It is evident that section 19 was intended to give an additional remedy and not to limit or take away those already in existence, and it is exceedingly doubtful if the section was intended to apply to a case like the instant one. In Lundgren v. Lundgren, 266 Ill. 292, the court quoted with approval (pp. 297-298) certain cases that support the position of appellants. Wilson v. Wilson, 108 Mass. 390, reviewed in the Lundgren case, seems to be a leading authority upon the subject. It is a general rule that a court has power to vacate a judgment at any time after the expiration of the term where the court was without jurisdiction

to enter judgment "and also where a judgment has been obtained through fraud, such fact constitutes a sufficient reason for vacating it after the term in which it was rendered. The fraud, however, must be a fraud committed by one of the parties on the court." (The People v. Drysch, 311 Ill. 342, 348-9. See also Conway v. Gill, 257 Ill. App. 606.)

There is no merit in the contention of appellees that the motion and affidavit of appellants fail to show a meritorious defense and that therefore the order appealed from should be affirmed. The rule requiring a meritorious defense to be shown applies to cases where a defendant is moving to vacate a decree, not as a matter of absolute right but as a matter of grace. For the same reason, there is no merit in the further contention of appellees that the order should be affirmed because the motion of appellants was not accompanied by an answer. It appears from the order denying appellants' motion that the chancellor regarded the failure of appellants to present an answer with the motion as an important fact in the determination of the motion.

After a careful consideration of the instant appeal we have reached the conclusion that the chancellor erred in overruling appellants' motion. While the motion may be somewhat informal, no demurrer was filed to the same, and it is apparent that the chancellor's action was based upon the assumption that appellants could proceed only under section 19. The motion, supported by the affidavit, sufficiently presents the issue as to whether or not the service by publication was obtained by false statements in the affidavit for publication notice. From a reading of the cases it appears that a party claiming that the court was without jurisdiction to enter a decree or judgment against him may proceed by motion, petition or bill. Complainants should be ruled to

to enter judgment "and also where a judgment has been obtained through fraud, such fact constitutes a sufficient reason for vacating it after the term in which it was rendered. The fraud, however, must be a fraud committed by one of the parties on the court." (The People v. Dexter, 211 III. 242, 248-9. See also Conway v. Gill, 257 III. App. 606.)

There is no merit in the contention of appellees that the motion and affidavit of appellants fail to show a meritorious defense and that therefore the order appealed from should be affirmed. The rule requiring a meritorious defense to be shown applies to cases where a defendant is moving to vacate a decree, not as a matter of absolute right but as a matter of grace. For the same reason, there is no merit in the further contention of appellees that the order should be affirmed because the motion of appellants was not accompanied by an answer. It appears from the order denying appellants' motion that the chancellor regarded the failure of appellants to present an answer with the motion as an important fact in the determination of the motion.

After a careful consideration of the instant appeal we have reached the conclusion that the chancellor erred in overruling appellants' motion. While the motion may be omewhat informal, no demurrer was filed to the same, and it is apparent that the chancellor's motion was based upon the assumption that appellants could proceed only under Section 1. The motion, supported by the affidavit, sufficiently presents the issue as to whether or not the service by publication was obtained by false statements in the affidavit for publication notice. From a reading of the cause it appears that a party claiming that the court was without jurisdiction to enter a decree or judgment against him may proceed by motion, petition or bill. Complainants should be ruled to

answer the motion and the affidavit in support of the same, and the chancellor can then determine, upon a hearing, the truth or falsity of the allegations contained in the said affidavit. Upon the hearing of the issue the burden will rest upon appellants to make out a clear and satisfactory case.

The order of the Superior court of Cook county is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Gridley and Sullivan, JJ., concur.

answer the motion and the affidavit in support of the same, and the chancellor can then determine, upon a hearing, the truth or falsity of the allegations contained in the said affidavit. Upon the hearing of the issue the burden will rest upon appellants to make out a clear and satisfactory case.

The order of the Superior court of Cook county is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Gridley and Sullivan, JJ., concur.

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37217

IN THE MATTER OF THE PETITION OF OWEN McGIVNEY,
Appellant,

ARRESTED AT THE SUIT OF WALTER KRUG,
Appellee.

APPEAL FROM COUNTY COURT OF COOK COUNTY.

275 I.A. 640²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Appellant, Owen McGivney, petitioned the County court of Cook county to release him from imprisonment under a writ of capias ad satisfaciendum upon a judgment in a cause wherein appellee, Walter Krug, was plaintiff and Owen McGivney, Philip McGivney, Maryland Casualty Company, McGivney & McGivney, Inc., Universal Finance Corporation and C. E. Oakes were defendants. After a hearing in the County court a judgment was entered remanding the appellant to the custody of the sheriff, from which judgment appellant has appealed. Upon the hearing in the County court the sole point urged by the petitioner was thus stated by his counsel: "The suit was brought against McGivney and Oakes and several others, among which was a corporation. The capias, which I now offer in evidence at this time, runs against McGivney, Oakes and others, including this corporation. The point of the petitioner is that the judgment being against the corporation and it not being amenable to capias, - in other words not subject to arrest and imprisonment, vitiates the capias against McGivney." As this point is not covered by any of the assignments of error we might well disregard it. No case was cited in the lower court or in this court that

57217

IN THE MATTER OF THE PETITION
OF OWEN MODIVANY,
Appellant,

AHEARING AT THE SUIT OF
WALTER KING,
Appellee.

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

MR. JUSTICE SOMMER DELIVERED THE OPINION OF THE COURT:

Appellant, Owen Modivany, petitioned the county court of Cook county to release him from imprisonment under a writ of capias ad satisfaciendum upon a judgment in a cause wherein appellee, Walter King, was plaintiff and Owen Modivany, Philip Modivany, Maryland Casualty Company, Modivany & Modivany, Inc., Universal Finance Corporation and [illegible] Oakes were defendants. After a hearing in the county court, a judgment was entered remanding the appellant to the custody of the sheriff, from which judgment appellant has appealed. Upon the hearing in the County court the sole point urged by the petitioner was thus stated by his counsel: "The suit was brought against Modivany and Oakes and several others, among which was a corporation. The capias, which I now offer in evidence at this time, runs against Modivany, Oakes and others, including this corporation. The point of the petitioner is that the judgment being against the corporation and it not being amenable to capias, - in other words not subject to arrest and imprisonment, vitiates the capias against Modivany." As this point is not covered by any of the assignments of error we might well disregard it. No case was cited in the lower court or in this court that

supports the contention. The judgment in the original proceeding is still in full force and effect as to all of the defendants, and while the capias ad respondendum designates all of the defendants it directs the arrest of the two individuals only. The command of the writ "to take the body" could not, of course, be directed against the corporations, but that fact did not enable the two individual defendants to avoid the capias as to them. There is no merit in the instant contention.

The appellant next contends that in the proceedings in the County court there was evidence introduced that showed that the judgment on which the capias was issued had been sold or assigned by Krug to one Annette Hanrahan and that as Krug had no further interest in the judgment the appellant should have been discharged from imprisonment on the capias that had been issued at the instance of Krug. No such point is made by any assignment of error and the appellant is therefore precluded from now raising it. However, there is not the slightest merit in it. While two witnesses testified that while the proceedings in the County court were pending Krug told McGivney that he had sold the judgment to Miss Hanrahan for $500, Krug testified that he did not sell or assign the judgment and that he did not state to appellant that he had; that appellant was constantly trying to settle the case with him but that nothing had ever been done in the matter; that he had never received any money from anybody for his judgment. It is apparent from the record that the trial court attached no weight to the testimony of appellant as to the alleged assignment, and it is quite apparent that the testimony in question was prompted solely by a desire to escape the effect of the capias.

In this court appellant contends that the trial court erred in finding malice the gist of the original action against appellant. There is not the slightest merit in this contention.

supports the conclusion. The judgment in the original proceeding is still in full force and effect as to all of the defendants, and while the writs of replevin designates all of the defendants it directs the arrest of the two individuals only. The command of the writ "to take the body" could not, of course, be directed against the corporations, but that fact did not enable the the individual defendants to avoid the penalties to them. There is no merit in the instant contention.

The appellant next contends that in the proceedings in the County court there was evidence introduced that showed that the judgment on which the writs were issued had been sold or assigned by King to one Annette Harrelson and that the King had no further interest in the judgment the appellant should have been discharged from imprisonment on the writs that had been issued at the instance of King. No such point is made by any assignment of error and the appellant is therefore precluded from now relating it. However, there is not the slightest merit in it. While two witnesses testified that while the proceedings in the County court were pending King told McGivney that he had sold the judgment to Miss Harrelson for $800, King testified that he did not sell or assign the judgment and that he did not state to appellant that he had; that appellant was constantly trying to settle the case with him but that nothing had ever been done in the matter; that he had never received any money from anybody for his judgment. It is apparent from the record that the trial court attached no weight to the testimony of appellant as to the alleged assignment, and it is quite apparent that the testimony in question was prompted solely by a desire to escape the effect of the writs.

In this court appellant contends that the trial court erred in finding malice the gist of the original action against appellant. There is not the slightest merit in this contention.

The amended declaration in the original proceeding, upon which the case went to the jury, consisted of two counts, in each of which it is alleged that appellant wilfully and maliciously broke and entered Krug's garage and took therefrom the automobile of the latter. It is the settled law of this state that if it appears from the pleadings of a civil suit under which an insolvent debtor was imprisoned that malice is the gist of the entire action, the judgment in such action is conclusive of the question of malice, and is res judicata. (See Jernberg v. Nix, 199 Ill. 254.)

The appellant contends that the torts referred to in chapter 77, par. 5, sec. 5, Cahill's Ill. Rev. St. of 1933, are criminal torts or wrongs, "as any other construction would be violative of the constitutional prohibition (Article II, Sec. 12) against imprisonment for debt." This point is not covered by any assignment of error, but even if it were, there is no merit in it. The constitutional provision which declares that no person shall be imprisoned for debt unless upon refusal to deliver up his estate, applies only to actions upon contracts, express or implied; it does not extend to actions for torts. (People v. Cotton, 14 Ill. 414; see also Buck v. Alex, 330 Ill. 167, 168-9.)

There is no merit in the instant appeal and the judgment of the County court of Cook county remanding the appellant to the custody of the sheriff of Cook county is affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

The amended declaration in the original proceeding, upon which the case went to the jury, consisted of two counts, in each of which it is alleged that appellant willfully and maliciously broke and entered Hung's garage and took therefrom the automobile of the latter. It is the settled law of this state that if it appears from the pleadings of a civil suit under which an injunctive tender was implored that malice is the plot of the entire action, the judgment in such action is conclusive of the question of malice, and is res judicata. (See Lerchen v. Ehr, 109 Ill. 294.)

The appellant contends that the state referred to in chapter 77, par. 8, sec. 3, Smith's Ill. Rev. St. of 1956, are criminal torts or wrongs, "in any other construction would be violative of the constitutional prohibition (article II, sec. 12) against imprisonment for debt." This point is not covered by any pleadings of error, but even if it were, there is no merit in it. The constitutional provision which declares that no person shall be imprisoned for debt unless upon refusal to deliver up his estate, applies only to actions upon contracts, express or implied; it does not extend to actions for torts. (Hopkins v. Gaston, 14 Ill. 494; see also Brown v. Jan, 26 Ill. 107, 108-9.)

There is no merit in the issues raised by the judgment of the County court of Cook county sustaining the appellant as the owner of the property of Cook county is affirmed.

AFFIRMED.

Sullivan, P. J., and Goldsby, J., concur.

8699

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. BLAINE HUFFMAN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

275 I.A. 640

BE IT REMEMBERED, that afterwards, to-wit: On MAY 10 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D., 1933

FRANK REED,
(Complainant) Defendant in Error,

vs.

FRANK S. RIVERS, OSCAR CLEFF,
E. L. COOK and FRED CROW, etal.,
(Defendants) Plaintiff in Error.

Writ of Error to
Circuit Court,
Lake County.

WOLFE ** P. J.

Frank N. Reed, the original complainant, filed his bill to foreclose a trust deed in the Circuit Court of Lake County. All of the plaintiffs in error, with other parties were made defendants to the bill. The bill was sworn to by Frank N. Reed. None of the defendants filed an answer to the bill. All were defaulted, and the bill taken as confessed against them. The record does not show that any evidence was offered in support of or against, the bill. The Court found the facts to be in accordance with the allegations of the bill, and ordered the Master to advertise and sell the property. The Master sold the property for the sum of $16,000.00 which left a deficit of $5,759.19.

The Master made a report of his sale of the property to the Court, and on motion of the complainant's solicitor a deficiency decree was entered against Frank S. Rivers, Caroline L. Kohl, Oscar Cleff and Fred Crow, holding each of them jointly and severally liable for the amount of the deficit. The Court entered a decree in accordance with the Master's findings and recommendation, on the 11th day of April, 1933. On the 13th day of April, 1933, an execution was issued out of the Circuit Court of Lake County against said defendants. On the 15th day of June, 1933, being one of the days of the said term of court, the defendants in error, through their solicitor, entered their motion to vacate and set aside the decree heretofore entered by said court on

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October term, A. D., 1933

FRANK REND,
(Complainant) Defendant in Error,

vs.

FRANK S. RIVERS, OSCAR OLSEN
E. L. COOK and THE STOW, etal.,
(Defendants) Plaintiff in Error.

Writ of Error to
Circuit Court,
Lake County.

VOLUME ## P. 1.

Frank N. Rend, the original complainant, filed his bill to foreclose a trust deed in the Circuit Court of Lake County. All of the plaintiffs in error, with other parties were made defendants to the bill. The bill was sworn to by Frank N. Rend. None of the defendants filed an answer to the bill. All were defaulted, and the bill taken as confessed against them. The record does not show that any evidence was offered in support of or against the bill. The Court found the facts to be in accordance with the allegations of the bill, and ordered the Master to advertise and sell the property. The Master sold the property for the sum of $15,00.00 which left a deficit of $3,279.19.

The Master made a report of his sale of the property to the Court, and on motion of the complainant, solicitor a deficit decree was entered against Frank S. Rivers, Caroline E. Cook, Oscar Olsen and Fred Stow, holding each of them jointly and severally liable for the amount of the deficit. The Court entered a decree in accordance with the Master's findings and recommendation, on the 11th day of April, 1933. On the 13th day of April, 1933, an execution was issued out of the Circuit Court of Lake County against said defendants. On the 13th day of June, 1933, being one of the days of the April term of Court, the defendants in error, through their solicitor, entered their motion to vacate and set aside the decree therefore entered by said court on

April 11, 1933. This motion was overruled by the court and the case is brought to this court for review.

The bill charges that the note and trust deed, was made only in the name of one of the plaintiffs in error, Fred Crow, yet the defendants Frank S. Rivers, Caroline L. Kohl, Oscar Cleff, E. L. Cook, and Fred Crow, were all beneficiaries under said trust agreement and were the purchasers of the property described in the deed of trust; that Fred Crow made and executed the notes and deed of trust; that the intention of the parties was to divide the property into lots and blocks and sell it at a profit and in that way pay off purchase money notes and the mortgage; that for this purpose the trust deed which they directed their trustee to execute, provided for such subdivision of said property; that upon payment of a certain price therefor they were to release the mortgage and convey the lots. The payments were to be credited upon their proper notes. That the defendants, Frank S. Rivers, Caroline L. Kohl, Oscar Cleff, E. L. Cook, and Fred Crow prepared a plat of the subdivision of said property together with other property belonging to said parties, and directed their trustee to approve the plat of subdivision, and when he secured the approval of the proper authorities, to record their plat of subdivision which is known as the Arden Shore Estates; that they sold certain lots and conveyed them and requested the owner of the notes to make a release of those notes, from the lien of the trust deed and to credit the payments upon the proper notes; that such releases were executed and filed of record clearing the title to these lots conveyed to the grantees; that credits were given them upon their proper notes; that the original note is now due and unpaid and they are jointly and severally liable upon their purchase money note.

It is insisted by the plaintiff in error that the trial court acquired no jurisdiction of the grantors, Frank S. Rivers, Oscar Cleff and E. L. Cook, for, having resorted to the foreclosure of the trust deed, to collect the amount due on the notes, it was the complainant's duty to exhaust such security before claiming relief

April 11, 1933. This motion was overruled by the court and the case is brought to this court for review.

The bill charges that the note and trust deed, was maddonly in the name of one of the plaintiffs in error, Fred Grow, yet the defendants Frank S. Rivers, Caroline L. Kohl, Oscar Olaff, E. L. Cook, and Fred Grow, were all beneficiaries under said trust agreement and were the purchasers of the property described in the deed of trust; that Fred Grow made and executed the notes and deed of trust; that the intention of the parties was to divide the property into lots and blocks and sell it at a profit and in that way pay off purchase money notes and the mortgage; that for this purpose the trust deed which they directed their trustee to execute, provided for such subdivision of said property; that upon payment of a certain price therefor they were to release the mortgage and convey the lots. The payments were to be credited upon their proper notes. That the defendants, Frank S. Rivers, Caroline L. Kohl, Oscar Olaff, E. L. Cook, and Fred Grow prepared a plat of the subdivision of said property together with other property belonging to said parties, and directed their trustee to approve the plat of subdivision, and when he secured the approval of the proper authorities, to record their plat of subdivision which is known as the Arden Shore Estates; that they sold certain lots and conveyed them and requested the owner of the notes to make a release of those notes, from the lien of the trust deed and to credit the payments upon the proper notes; that such releases were executed and filed of record clearing the title to these lots conveyed to the grantees; that credits were given them upon their proper notes; that the original note is now due and unpaid and they are jointly and severally liable upon their purchase money note.

It is insisted by the plaintiff in error that the trial court acquired no jurisdiction of the grantors, Frank S. Rivers, Oscar Olaff and E. L. Cook, for, having resorted to the foreclosure of the trust deed, to collect the amount due on the notes, it was the complainant's duty to exhaust such security before claiming relief

against them, and then he should have resorted to a court of law, if anything remained due to him for which they were legally liable; that their liability on the notes, if any, is by reason of their several endorsements and is purely a question of law, and they were neither necessary nor proper parties to the foreclosure proceeding.

The notes were endorsed as follows: "We guarantee the payment of this note to the extent of fifty per cent (50%) of the amount due thereon.

(Signed) Caroline L. Kohl
(Signed) Frank S. Rivers."

"I guarantee the payment of this note to the extent of twenty-five per cent (25%) of the amount due thereon.

(Signed) Oscar Cleff."

"I guarantee the payment of this note to the extent of twenty-five per cent (25%) of the amount due thereon."

(Signed) E. L. Cook."

It is upon these endorsements that the defendants now claim that they were not necessary or proper parties to the foreclosure proceedings and that the court erred in granting personal judgments against them for the deficiency due on the sale price of the premises.

This is not the theory of the bill or decree of the court on which the plaintiff in error were held liable for the deficiency in the sale of this property, but on the theory as stated in the bill of complaint that, although the plaintiffs in error did not all sign the note or trust deed, it does not release their note and their obligation, and that they are all liable as makers of the note and as joint adventurers, and on this theory the bill alleges that they are personally liable to pay the note, or any deficiency, if there be one. The court in his findings and decree finds these allegations of fact and law to be true. The plaintiffs in error have failed to answer the bill. Under a decree pro confesso a defendant cannot, on error, allege the want, or insufficiency of the testimony, or the insufficiency or amount of the evidence that may have been heard by the court entering the decree. Where defendants are persons not under disability and a default is entered, a decree pro confesso

against them, and then he should have resorted to a court of law, if anything remained due to him for which they were legally liable; that their liability on the notes, if any, is by reason of their several endorsements and is purely a question of law, and they were neither necessary nor proper parties to the foreclosure proceeding.

The notes were endorsed as follows: "We guarantee the payment of this note to the extent of fifty per cent (50%) of the amount due thereon.

(Signed) Caroline L. Kohl
(Signed) Frank E. Rivers."

"I guarantee the payment of this note to the extent of twenty-five per cent (25%) of the amount due thereon.

(Signed) Oscar Clark."

"I guarantee the payment of this note to the extent of twenty-five per cent (25%) of the amount due thereon."

(Signed) H. L. Cook."

It is upon these endorsements that the defendants now claim that they were not necessary or proper parties to the foreclosure proceedings and that the court erred in granting personal judgments against them for the deficiency due on the sale price of the premises.

This is not the theory of the bill or decree of the court on which the plaintiff in error were held liable for the deficiency in the sale of this property, but on the theory as stated in the bill of complaint that, although the plaintiffs in error did not all sign the note or trust deed, it does not release their note and their obligation, and that they are all liable as makers of the note and as joint adventurers, and on this theory the bill alleges that they are personally liable to pay the note, or any deficiency, if there be one. The court in his findings and decree finds these allegations of fact and law to be true. The plaintiffs in error have failed to answer the bill. Under a decree pro confesso a defendant cannot, on error, allege the want, or insufficiency of the testimony, or the insufficiency or amount of the evidence that may have been heard by the court entering the decree. The defendants are persons not under disability and a default is entered, a decree pro confesso

follows as a matter of course. Such decree, if warranted by the averments of the bill, is unassailable.--Monarch Brewing Co. vs. Wolford, 179 Ill., 252. We think that the averments in the bill sufficiently state a cause of action and charge the plaintiffs in error as being jointly and severally liable on the notes in question.

It is next insisted that the court erred in holding the plaintiffs in error jointly and severally liable in the deficiancy decree, for the reason that they were only liable as guarantors, and as such their liability was limited and could not be extended. We do not deem it necessary for a proper decision of this case to discuss this assignment of error as the case was not submitted to the trial court upon this theory, but upon the theory of a joint undertaking. The case of Greenleaf et al. Feinberg, 210 Ill., App., 271, is a case very similar to the one we are now considering, and in discussing the matter the Court says: "It is contended by plaintiffs in error that they are not personally liable for the amount of the deficiency and that, accordingly, the decree which was entered is erroneous. The evidence shows--no evidence was offered on behalf of the plaintiffs in error to the contrary--that at the outset the seven participants, Feinberg, Loeffler, Lorimer, Murphy, Dorman, Engel and Bromann, entered into an oral agreement that they would buy a certain piece of real estate, take the title thereto in the name of Bromann for the benefit of all of them, subdivide the property into lots and then handle it on a certain prearranged syndicate plan for their mutual pecuniary profit. It is the law that a partnership may adopt the individual name of one of its members as the name under which it shall do business, and bind itself and each of the partners by the use of that name. "The firm name is such as the copartners choose to adopt. It may disclose the names of all the partners or of none of them, or the name of but one of them may be used, as the firm name. ****** Where a written instrument bears the name of but one person, presumably it is the undertaking of that person; but it is competent to establish by parol proof that the contract is that of the copartnership and that the firm entered into the contract in the name and style of the individual."

follows as a matter of course. Such course, it maintained by the averments of the bill, is unassailable.--Monarch Brewing Co. vs. Holford, 179 Ill., 252. We think that the averments in the bill sufficiently state a cause of action and impose the plaintiffs in error as being jointly and severally liable on the notes in question.

It is next insisted that the court erred in holding the plaintiffs in error jointly and severally liable in the deficiency decree, for the reason that they were only liable as guarantors, and as such their liability was limited and could not be extended. We do not deem it necessary for a proper decision of this case to discuss this assignment of error as the case was not submitted to the trial court upon this theory, but upon the theory of a joint undertaking. The case of Greenleaf et al. Feinberg, 210 Ill., app., 271, is a case very similar to the one we are now considering, and in discussing the matter the court says: "It is contended by plaintiffs in error that they are not personally liable for the amount of the deficiency and that, accordingly, the decree which was entered is erroneous. The evidence shows--no evidence was offered on behalf of the plaintiffs in error to the contrary--that at the outset the seven participants, Feinberg, Loeffler, Jordan, Murphy, Morris, Engel and Grossman, entered into an oral agreement that they would buy a certain piece of real estate, take the title thereto in the name of Grossman for the benefit of all of them, subdivide the property into lots and then handle it on a certain prearranged profit-sharing plan for their mutual pecuniary profit. It is the law that a partnership may adopt the individual name of one of its members as the firm name under which it shall do business, and bind itself and each of its partners by the use of that name. "The firm name is such as the co-partners choose to adopt. It may disclose the names of all the partners or of more of them, or the name of but one of them may be used, as the firm name. Where a written instrument bears the name of but one person, presumably it is the undertaking of that person; but it is competent to establish by parol proof that the contract is that of the company notably and that the firm entered into the contract in the name and style of the individual."

The enterprise therefore fell within the definition of a joint adventure, as an association of two or more persons to carry out a single business enterprise for profit. A joint adventure has been said to be a commercial or maritime enterprise undertaken by several persons jointly; a limited partnership -- not limited in the statutory sense as to the liabilities of the partners but as to its scope and duration. A joint adventure is not regarded as identical with a partnership, the relation of the parties is so similar that their rights and liabilities are usually tested by the rules which govern partnerships.

The bill charges and the court found that this was a joint and several adventure among the plaintiffs in error; that the property had been platted and some of it sold; that the purchase price of the lots sold amounted to $900.00 and the same has been credited on the back of the principal note. That the plaintiffs in error had taken advantage of the provision granted them in the deed of trust, and as such each and every one is jointly and severally liable for the deficiency as found by the decree of court.

We find no reversible error in this case and the judgment of the Circuit Court of Lake County is hereby affirmed.

Judgment affirmed.

The enterprise therefore fell within the definition of a joint adventure, as an association of two or more persons to carry out a single business enterprise for profit. A joint adventure has been said to be a commercial or maritime enterprise undertaken by several persons jointly; a limited partnership -- not limited in the statutory sense as to the liabilities of the partners but as to its scope and duration. A joint adventure is not regarded as identical with a partnership, the relation of the parties is so similar that their rights and liabilities are usually tested by the rules which govern partnerships.

The bill charges and the court found that this was a joint and several adventure among the plaintiffs in error; that the property had been platted and some of it sold; that the purchase price of the lots sold amounted to $9000.00 and the same has been credited on the book of the principal note. That the plaintiffs in error had taken advantage of the provision granted them in the deed of trust, and as such each and every one is jointly and severally liable for the deficiency as found by the decree of court.

We find no reversible error in this case and the judgment of the Circuit Court of Lake County is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON. Clerk of the Appellate Court. in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAY 10 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8711 Ag. No. 7.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1933.

Bertha M. Phelps,

Appellee,

vs.

Appeal from the Circuit Court of DeKalb County.

Charles Bark and Charles Larson and Charles Bark, Executor of the Last Will and Testament of Ila A. Woodward, deceased,

Appellants.

WOLFE-- P.J.

Bertha M. Phelps, one of the heirs and legatees under the will of Ila A. Woodward, deceased, filed a bill of complaint in the Circuit Court of DeKalb County on May 27, 1932. The bill charges that Charles Larson and Charles Bark, appellants who were named defendants in the bill, as having occupied fiduciary relations with Ila A. Woodward in her life time. Ila A. Woodward was an elderly person,and at her death was ninety-one years of age. The appellee further charges that a few years before the time of Mrs. Woodward's death, and, while said Charles Bark occupied such fiduciary relationship she appointed said Charles Bark her attorney in fact by a written instrument, to take charge of her property; that Charles Larson was also a confidant of the family and also a great friend of Charles Bark and assisted him in transacting the business affairs of Ila A. Woodward after the death of her husband.

The appellee charges the appellants with having appropriated $50,000.00 worth of Liberty Bonds, the property of the estate of Ila A. Woodward, deceased, to their own use.

Charles Bark filed his answer to the bill of complaint on June 20, 1932, and Charles Larson filed his answer on June 27, 1932. They both denied that they fraudulently converted to their

No. 8711 Ar. No. 7.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1933.

Bertha M. Phelps,

Appellee,

vs.

Charles Park and Charles Larson and Charles Park, Executor of the last Will and Testament of Ila A. Woodward, deceased,

Appellants.

Appeal from the Circuit Court of DeKalb County.

WOLFE-- P.J.

Bertha M. Phelps, one of the heirs and legatees under the will of Ila A. Woodward, deceased, filed a bill of complaint in the Circuit Court of DeKalb County on May 27, 1932. The bill charges that Charles Larson and Charles Park, appellants who were named defendants in the bill, as having occupied fiduciary relations with Ila A. Woodward in her life time. Ila A. Woodward was an elderly person, and at her death was ninety-one years of age. The appellee further charges that a few years before the time of Mrs. Woodward's death, and, while said Charles Park occupied such fiduciary relationship she appointed said Charles Park her attorney in fact by a written instrument, to take charge of her property; that Charles Larson was also a confidant of the family and also a great friend of Charles Park and assisted him in transacting the business affairs of Ila A. Woodward after the death of her husband.

The appellee charges the appellants with having appropriated $30,000.00 worth of Liberty Bonds, the property of the estate of Ila A. Woodward, deceased, to their own use.

Charles Park filed his answer to the bill of complaint on June 20, 1932, and Charles Larson filed his answer on June 27, 1932. They both denied that they fraudulently converted to their

own use the bonds as charged in the bill of complaint. Replications were considered filed to the answers and the suit was at issue and ready for trial. Complainant served a notice on the defendants that she would, on December 23, 1932, move the court to set said case for a hearing on December 27, 1932. On December 23, 1932, both Charles Bark and Charles Larson, the defendants, appeared in open court and filed their motion to dismiss complainant's bill because complainant was a non-resident of the State of Illinois, and had not filed a bond for costs in compliance with the Statute, and also because the bill did not join all the proper parties defendant, having particular reference to the wife of the defendant, Charles Bark, who was a legatee under the will of Ila A. Woodward, deceased. The motions were continued until December 28, 1932, whereupon the court entered an order granting the defendant's motion to dismiss, but allowed the complainant to file a cross-motion in which she asked leave to file a cost bond and to amend her bill to comply with the requirements of the court. The court entered an order on December 28, 1932, granting the complainant fifteen days from December 28, 1932, within which time to make her amendment, and file the cost bond. On December 30, 1932, Charles Larson and Charles Bark filed separate cross-bills in said cause without obtaining leave of court to do so, and did not notify the complainant, or her counsel, that they were going to file the cross-bill. The complainant did not file a cost bond, or amend her bill of complaint and upon the expiration of fifteen days from December 28, 1932, she claims that the order of court dismissing said cause became final. On December 28, 1932, the complainant, Bertha M. Phelps, decided not to pursue her right under the bill of complaint in chancery, but fileda petition in the Probate Court of said county under Sections 81 and 82 of the Administration Act. Upon that date she filed a petition in the Probate Court citing Charles Larson before said court to show cause, if any, he had, why Liberty Bonds amounting to $25,000.00, par value,

own use the bonds as charged in the bill of complaint. Certificates were considered filed to the answers and the suit was at issue and ready for trial. Complainant served a notice on the defendants that she would, on December 24, 1932, move the court to set said case for a hearing on December 27, 1932. On December 27, 1932, both Charles Park and Charles Larson, the defendants, appeared in open court and filed their motion to dismiss complainant's bill because complainant was a non-resident of the State of Illinois, and had not filed a bond for costs in compliance with the statute, and also because the bill did not join all the proper parties defendant, namely particular reference to the wife of the defendant, Charles Park, who was a legatee under the will of the testator, deceased. The motions were continued until December 30, 1932, whereupon the court entered an order granting the defendant's motion to dismiss, but allowed the complainant to file a cross-motion in which she asked leave to file a cost bond and to amend her bill to comply with the requirements of the court. The court entered an order on December 28, 1932, granting the complainant fifteen days from date, December 30, 1932, within which time to make her amendment, and file the cost bond. On December 30, 1932, Charles Larson and Charles Park filed separate cross-bills in said county without obtaining leave of court to do so, and did not notify the complainant, or her counsel, that they were going to file the cross-bill. The cross-bill did not allege a cost bond, or amend her bill of complaint and bond for complainant's fifteen days from December 28, 1932, the defendants had entered an order of court dismissing said cross-bill. On January 23, 1933, the complainant, Lorth [illegible], filed a petition under the bill of complaint in chancery, but filed petition in the Probate Court of said county under sections 21 and 22 of the administration act. Upon that date the filed a petition in the Probate Court citing Charles Larson before said court to show cause, if any, he had, why liberty bonds amounting to $2,[illegible].00, [illegible],

taken by him from Ila A. Woodward, in her life time, should not be inventoried as a part of the estate of Ila A. Woodward, deceased.

On January 10, 1933, after the said Charles Larson had been served with notice to appear and defend the petition filed in the Probate Court, the said Charles Larson and Charles Bark came before the Circuit Court and filed their separate motions to withdraw their motion to dismiss complainant's bill of complaint for want of a cost bond and proper parties defendant on which the order of the court had been entered on December 28, 1932, allowing the motion to dismiss the original bill unless the complainant, Bertha M. Phelps, filed her bond for costs and amended her bill within fifteen days from December 28, 1932, in accordance with the Statute for bonds for costs. Each of the cross-bills prayed for an injunction to restrain the complainant, Bertha M. Phelps, from prosecuting and maintaining in the Probate Court of DeKalb County her petition for the recovery of the bonds alleged to have been converted by the cross-complainants.

The complainant, Bertha M. Phelps, did not file a bond for costs, nor amend her bill of complaint, and on January 16, 1933, the same being more than fifteen days after the entering of the order on December 28, 1932, the complainant filed her limited appearance and a written motion in said court for the purpose of contesting the jurisdiction of the court and to dismiss the cross-bill and the original bill of complaint. On May 8, 1933, after a hearing upon the motion to dismiss, the court entered an order dismissing the cross-bills and the original bill of complaint. The order of the court finds: "That said cross-bills pray for no affirmative relief excepting said restraining order before mentioned, and that said cross bills should be stricken according to the motion of the complainant, cross defendant, and the original bill dismissed under the order of this court entered on December 28, 1932, for want of a cost bond and lack of proper parties." The defendants perfected an appeal to this court.

taken by him from Ila A. Woodward, in her life time, should not be inventoried as a part of the estate of Ila A. Woodward, deceased.

On January 10, 1933, after the said Charles Larson had been served with notice to appear and defend the petition filed in the Probate Court, the said Charles Larson and Charles Bark came before the Circuit Court and filed their separate motions to withdraw their motion to dismiss complainant's bill of complaint for want of a cost bond and proper parties defendant on which the order of the court had been entered on December 28, 1932, allowing the motion to dismiss the original bill unless the complainant, Bertha M. Phelps, filed her bond for costs and amended her bill within fifteen days from December 28, 1932, in accordance with the statute for bonds for costs. Each of the cross-bills prayed for an injunction to restrain the complainant, Bertha M. Phelps, from prosecuting and maintaining in the Probate Court of DeKalb County her petition for the recovery of the bonds alleged to have been converted by the cross-complainants.

The complainant, Bertha M. Phelps, did not file a bond for costs, nor amend her bill of complaint, and on January 10, 1933, the same being more than fifteen days after the entering of the order on December 28, 1932, the complainant filed her limited appearance and a written motion in said court for the purpose of contesting the jurisdiction of the court and to dismiss the cross-bill and the original bill of complaint. On May 8, 1933, after a hearing upon the motion to dismiss, the court entered an order dismissing the cross-bills and the original bill of complaint. The order of the court finds: "That said cross-bills pray for no affirmative relief excepting said restraining order before mentioned, and that said cross bills should be stricken according to the motion of the complainant, cross defendant, and the original bill dismissed under the order of this court entered on December 28, 1932, for want of a cost bond and lack of proper parties." The defendants perfected an appeal to this court.

The defendant in the original bill, Charles Larson and the cross complainant in one of the cross-bills did not perfect an appeal. Charles Bark is the sole and only appellant herein. The appellant, Charles Bark, was not a party to the citation proceeding instituted in the Probate Court of DeKalb County on December 28, 1932, by Bertha M. Phelps. The appellant insists that the court erred in not only dismissing the original bill of complaint but in dismissing his cross-bill, and insists that the cross-bill stated a good cause of action and asked for affirmative relief.

An examination of the bill discloses that the cross-bill does not set forth any new matter that was not contained in their answer to the original bill, with the exception that they ask for an injunction to restrain Bertha M. Phelps, the complainant in the original bill from prosecuting her suit in the Probate Court of DeKalb County. The question then arises: Does this bill set forth such new matter as would entitle the appellant, Charles Bark, to maintain his cross-bill. In the case of Roby V. South Park Commissioners, 252 Ill. p. 575, the court in discussing the merits of a cross-bill and when it can not be maintained, used the following language: "A cross-bill is a mode of defense. Where it is necessary for a defendant to have relief concerning the subject matter of the litigation different from that sought by the complainants where it is necessary to the defense to obtain some discovery or where facts occurring subsequently to the filing of an answer are material to the defense, a cross-bill is the proper method of bringing these matters to the attention of the court. It is only where complete justice can not be done on the original bill and answer that a cross-bill is proper. If the same matter is equally availabe by way of answer, the cross-bill is unnecessary. In Newberry v. Blatchford, 106 Ill. 587, the Attorney General, who was a defendant, filed an answer substantially admitting the allegations of the bill and a

The defendant in the original bill, Martha Larson and the cross complainant in one of the cross-bills did not perfect an appeal. Charles Park in the sole and only appellant herein. The appellant, Charles Park, was not a party to the citation proceeding instituted in the Probate Court of DeKalb County on December 28, 1936, by Bertha G. Phelps. The appellant insists that the court erred in not only dismissing the original bill of complaint but in dismissing his cross-bill, and insists that the cross-bill stated a good cause of action and asked for affirmative relief.

An examination of the bill discloses that the cross-bill does not set forth any new matter that was not contained in their answer to the original bill, with the exception that they ask for an injunction to restrain Bertha G. Phelps, the administrator in the original bill from proceeding further in the Probate Court of DeKalb County. The question then arises: Does this bill set forth such new matter as would entitle the appellant, Charles Park, to maintain his cross-bill. In the case of Doty v. South Park Commissioners, 352 Ill. p. 396, the court in discussing the merits of a cross-bill and when it can not be maintained, used the following language: "A cross-bill is a bona fide action. Where it is necessary for a defendant to have relief concerning the subject matter of the litigation different from that sought by the complainants there it is necessary to the ends of justice that a cross-bill or answer or some form equivalent thereto be filed in the trial court or answer can be resorted to the defense, a cross-bill is the proper method of bringing other matters to the attention of the court. It is only where a complete justice can not be done on the original bill and one or the cross-bill is proper. If the same action is equally available by way of answer, the cross-bill is unnecessary. In Northwestern v. Mutchenbacher, 108 Ill. 364, the Attorney General, who was a defendant, filed an answer substantially admitting the allegations of the bill and a

cross-bill asking the same relief as the original bill. It was held that the cross-bill was filed in violation of the well established chancery practice. The Court said: "The cross-bill in this case was for no purpose the law permits such a bill to be used. No discovery was sought and no relief was asked that was not attainable, if at all, on his answer. This is stating no new rule of practice. It was decided by this court as long ago as in Morgan V. Smith, 11 Ill. 194, a defendant will not be permitted to file a cross-bill when his rights are fully disclosed in his answer in response to the allegations of the bill and might be fully protected by the court on the hearing of the original bill, and the cross-bill of the defendant was held to have been properly stricken out of the record because it was in violation of proper practice.** It is not understood the practice in chancery will permit a defendant to file a cross-bill praying the same thing may be done as is sought to be accomplished by the original bill. A demurrer would lie to such a cross-bill, or it might be dismissed on motion, as was done in Morgan vs. Smith." It is our opinion that this cross-bill did not state any new matter that would entitle them to any relief that could not be obtained under their answer to the original bill, and the court properly dismissed the same for want of equity.

The appellant seriously contends that the court having taken jurisdiction in this matter should have maintained it and see that justice is done between the parties, because he could not make an adequate defense in the Probate Court the same as he could in a court of equity, and that the Probate Court did not have jurisdiction to adjudicate a question of this kind. The appellee in her suit in the Probate Court is not attempting to collect a debt from the appellant, or from Charles Larson, but is trying to compel them to return specific property that she claims belongs to the estate of Ila A. Woodward. In the case of Hudson vs. Swartz, reported in

cross-bill asking the same relief as the original bill. It was held that the cross-bill was filed in violation of the well established chancery practice. The Court said: "The cross-bill in this case was for no purpose the law permits such a bill to be used. No discovery was sought and no relief was asked that was not attainable, if at all, on his answer. This is stating no new rule of practice. It was decided by this court as long ago as in Morgan v. Smith, 11 Ill. 194, a defendant will not be permitted to file a cross-bill when his rights are fully disclosed in his answer in response to the allegations of the bill and might be fully protected by the court on the hearing of the original bill, and the cross-bill of the defendant was held to have been properly stricken out of the record because it was a violation of proper practice." It is not understood the practice in chancery will permit a defendant to file a cross-bill praying the same thing may be done as is sought to be accomplished by the original bill. A demurrer would lie to such a cross-bill, or it might be dismissed on motion, as was done in Morgan vs. Smith." It is our opinion that this cross-bill did not state any new matter that would entitle them to any relief that could not be obtained under their answer to the original bill, and the court properly dismissed the same for want of equity.

The appellant earnestly contends that the court improperly taken jurisdiction in this matter should have remanded it to see that justice is done between the parties, because he could not make an adequate defense in the probate court the same as he could in a court of equity, and that the probate court did not have jurisdiction to adjudicate a question of this kind. The appellee in an suit in the Probate Court is not attempting to collect a debt from the appellant, or from Charles Brown, but is trying to compel him to return specific property that he claims belongs to the estate of Ila A. Woodward. In the case of Hutson vs. Hurley, reported in

345 Ill. Page 609, the Court discusses Sections 81 and 82 of the Administration Act, and in the opinion says: "Sections 81 and 82 of the Administration Act before their amendment in 1925 created a right of reaching property which had been placed by the deceased in his life time in the possession of the party charged, and the remedy did not extend to the determination of a contested right or title to the property because no provision was made for the trial by jury, without which no man can be deprived, constitutionally, of his property. By the amendment (Laws of 1925, pp. 1 and 2) the remedy was extended to property belonging to the "executor or administrator of the estate of any deceased person," and power was conferred on the court to determine "all controverted questions of title and claims of adverse title and to determine the right of property" by a trial by jury upon the demand of either party.-- (Johnson vs. Nelson, 341 Ill., 119) This remedy is not, however, applicable to the collection of a debt."

We think this case fully sustains the contention of the appellee that the Probate Court is the proper forum in which to bring a suit to determine the right to the property in controversy. (People ex rel Olsen vs. Templeman, administrator, 265 Ill., App. 369.)

We find no reversible error in the case and the order of the Circuit Court of DeKalb County dismissing the bill and cross-bill is hereby affirmed.

Judgment affirmed.

345 Ill. Page 609, the Court discusses Sections 81 and 82 of the Administration Act, and in the opinion says: "Sections 81 and 82 of the Administration Act before their amendment in 1925 created a right of receiving property which had been placed by the deceased in his life time in the possession of the party charged, and the remedy did not extend to the determination of a contested right or title to the property because no provision was made for the trial by jury, without which no man can be deprived, constitutionally, of his property. By the amendment (Laws of 1925, pp. 1 and 2) the remedy was extended to property belonging to the "executor or administrator of the estate of any deceased person," and power was conferred on the court to determine "all controverted questions of title and claims of adverse title and to determine the right of property" by a trial by jury upon the demand of either party.-- (Johnson vs. Nelson, 341 Ill., 119) This remedy is not, however, applicable to the collection of a debt."

We think this case fully sustains the contention of the appellee that the Probate Court is the proper forum in which to bring a suit to determine the right to the property in controversy. (People ex rel Olsen vs. Templeman, administrator, 255 Ill., App. 529.)

We find no reversible error in the case and the order of the Circuit Court of DeKalb County dismissing the bill and cross-bill is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAY 10 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8723 Ag. No. 10

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1934.

Bernard F. Pohren,
(Plaintiff) Appellee,

vs.

Appeal from Circuit Court,
Winnebago County.

R. W. Youngberg and Carl
Erickson, doing business
as the Blackhawk Welding
Shop,
(Defendants) Appellants

WOLFE-- P.J.

The plaintiff, Bernard F. Pohren, a resident of the City of Chicago, brought an action of replevin in the Circuit Court of Winnebago County against R. W. Youngberg and Carl Erickson, doing business as the Blackhawk Weling Shop, which business they were conducting in the City of Rockford. The declaration is in the usual form in actions of replevin. Pleas were filed denying the unlawful taking and unlawful detention of the property, and alleged property in the defendant, R. W. Youngberg. It is not disputed that the evidence shows that Youngberg is the proprietor of the Blackhawk Weling Shop and that he is the only defendant who claims to be the lawful owner of the property.

When the action was brought, the chattels, consisting chiefly of an automobile truck, welding equipment and tools, were in the possession of Youngberg in Rockford. He had moved them from Chicago to Rockford. The plaintiff at the trial claimed that the chattels were unlawfully taken from his possession in Chicago by a purported assignee of a chattel mortgage and by him sold under mortgage foreclosure; that Youngberg subsequently bought them from one who traced his title to the purchaser at the foreclosure sale. It was also claimed by the plaintiff that the purchaser at the foreclosure sale

No. 8723 Ag. No. 10

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1934.

Bernard F. Poren,
(Plaintiff) Appellee,

vs.

R. W. Youngberg and Carl Erickson doing business as the Blackhawk Welding Shop,
(Defendants) appellants

Appeal from Circuit Court, Winnebago County.

WOLFE-- P.J.

The plaintiff, Bernard F. Poren, a resident of the City of Chicago, brought an action of replevin in the Circuit Court of Winnebago County against R. W. Youngberg and Carl Erickson, doing business as the Blackhawk Welding Shop, which business they were conducting in the City of Rockford. The declaration is in the usual form in actions of replevin. Pleas were filed denying the unlawful taking and unlawful detention of the property, and alleged property in the defendant, R. W. Youngberg. It is not disputed that the evidence shows that Youngberg is the proprietor of the Blackhawk Welding Shop and that he is the only defendant who claims to be the lawful owner of the property.

When the action was brought, the chattels, consisting chiefly of an automobile truck, welding equipment and tools, were in the possession of Youngberg in Rockford. He had moved them from Chicago to Rockford. The plaintiff at the trial claimed that the chattels were unlawfully taken from his possession in Chicago by a purported assignee of a chattel mortgage made by him said under mortgage foreclosure; that Youngberg subsequently bought them from one who trained his title to the purchaser at the foreclosure sale. It was also claimed by the plaintiff that the purchaser at the foreclosure sale

obtained no title to the chattels for reasons which will hereafter appear, that Youngberg was present at the foreclosure sale and that he was then informed that the chattels were unlawfully taken and held by the alleged assignee of the mortgage. There were antecedent transactions relative to the plaintiff's claim of ownership of the chattels involving persons and events with which the defendant Youngberg had no connection nor knowledge. These occurrences took place in Chicago before Youngberg was aware of the existence of the chattels. We agree with the counsel for Youngberg that his client should not be made to suffer for these anterior dealings and transactions concerning the ownership and title of the property if he had no actual or constructive knowledge of them. If it appears from the evidence that Youngberg was an innocent buyer for value of the chattels from one who had the legal title, or he had the legally recognized ostensible right to convey the legal title to the property, this court would be solicitous to give his claim of ownership of the property the protection which the law accords to one who is a bona fide purchaser, as the term "bona fide" purchaser is defined and understood in law. The position of Youngberg as the buyer of the goods replevined has given this court cause for concern. If he must surrender the goods, for which he has paid full value, because of the application of the rule, that in a contest between two innocent persons, the one in greater fault must sustain a loss, it is to be regretted. We must apply to the facts the established legal principles. As will hereafter appear, Youngberg took a risk buying the goods by relying solely on the possession of the one who had the goods, as conclusive evidence of the possessor's ownership of and title to them.

In this replevin action the burden was on the plaintiff to prove his title to the property. He introduced in evidence a bill of sale, dated November 21, 1931, signed by Leo Jablonski, which

obtained no title to the chattels for reasons which will hereafter appear, that Youngberg was present at the foreclosure sale and that he was then informed that the chattels were unlawfully taken and held by the alleged assignee of the mortgage. There were antecedent transactions relative to the plaintiff's claim of ownership of the chattels involving persons and events with which the defendant Youngberg had no connection nor knowledge. These occurrences took place in Chicago before Youngberg was aware of the existence of the chattels. We agree with the counsel for Youngberg that his client should not be made to suffer for these anterior dealings and transactions concerning the ownership and title of the property if he had no actual or constructive knowledge of them. If it appears from the evidence that Youngberg was an innocent buyer for value of the chattels from one who had the legal title, or he had the legally recognized obtainable right to convey the legal title to the property, this court would be reluctant/one to give his claim of ownership of the property the protection which the law accords to one who is a bona fide purchaser, as the term "bona fide" purchaser is defined and understood in law. The position of Youngberg as the buyer of the goods replevined has given this court cause for concern. If he must surrender the goods, for which he has paid full value, because of the application of the rule, that in a contest between two innocent persons, the one in greater fault must sustain a loss, it is to be regretted. We must apply to the facts the established legal principles. As will hereafter appear, Youngberg took a risk buying the goods by relying solely on the possession of the one who had the goods, as conclusive evidence of the possessor's ownership of and title to them.

In this replevin action the burden was on the plaintiff to prove his title to the property. He introduced in evidence a bill of sale, dated November 21, 1921, signed by Leo Zablonski, which

transferred the title to the chattels to Charles T. Marsh and Bernard F. Pohren. In November, 1931, Marsh and Pohren entered into a partnership under an oral agreement. At the time the bill of sale was executed, or shortly thereafter, they began doing a welding business, as partners, under the firm name of the Anzac Welding Company. The business was conducted in a building known as 2422 Homer Avenue, Chicago. $850.00 was paid for the chattels now the subject matter of the replevin action, and the partnership took possession of it and placed it in the above building.

The business of the Anzac Welding Company did not prosper, and the firm needed $300.00 to pay rent for the building and other bills of the firm. On March 2, 1932, Marsh and Pohren secured a loan of $300.00 from the Dearborn Loan Company, Inc., of Chicago, and on that date gave to the loan company their note for the amount. The principal of the note was payable in installments and the unpaid installments were to draw interest at the rate of 3½ per centum per month. To secure the note, Pohren and Marsh executed a chattel mortgage conveying the chattels in question to the loan company. The note is briefly described in the chattel mortgage which alone was introduced in evidence and the mortgage is the only source from which we can obtain any information concerning the note. The loan company, it is conceded by the parties was a licensee under the act regulating the business of making small loans at a greater rate of interest than seven per centum per annum (Smith-Hurd Rev. St. Chap. 74, Sec.13). The validity of the note as the property of the loan company is not questioned.

Shortly after the execution of the mortgage, Pohren and Marsh became involved in a controversy whether the location of the place of business should be changed to a smaller building than the one the firm was occupying. They never reached an understanding in that respect. On March 28, Pohren having secured a permit from the loan company to move the property from Homer Avenue to 5321 Milwaukee Avenue, Chicago, placed the property in a smaller build-

transferred the title to the chattels to Charles T. Marx and Bernard F. Dohrn. In November, 1921, Marx and Dohrn entered into a partnership under an oral agreement. At the time the bill of sale was executed, or shortly thereafter, they began doing a welding business, as partners, under the firm name of the Amazo Welding Company. The business was conducted in a building known as 2422 Homer Avenue, Chicago. $800.00 was paid for the chattels now the subject matter of the replevin action, and the partnership took possession of it and placed it in the above building.

The business of the Amazo Welding Company did not prosper, and the firm needed $300.00 to pay rent for the building and other bills of the firm. On March 2, 1922, Marx and Dohrn secured a loan of $300.00 from the Dearborn Loan Company, Inc., of Chicago, and on that date gave to the loan company their note for the amount. The principal of the note was payable in instalments, and the unpaid instalments were to draw interest at the rate of 2% per centum per month. To secure the note, Dohrn and Marx executed a chattel mortgage conveying the chattels in question to the loan company. The note is briefly described in the chattel mortgage which alone was introduced in evidence and the mortgage is the only source from which we can obtain any information concerning the note. The loan company, it is conceded by the parties was a licensee under the act regulating the business of making small loans at a greater rate of interest than eight per centum per annum (Smith-Hurd Ann. St. Chap. 17, Sec. 12). The validity of the note as the property of the loan company is not questioned.

Shortly after the execution of the mortgage, Dohrn and Marx became involved in a controversy whether the location of the place of business should be changed to a more suitable one, at which time the firm was occupying. Dohrn never resumed an interest in that respect. On March 6, Dohrn having secured a permit from the loan company to move the property from Homer avenue to 2321 Milwaukee Avenue, Chicago, placed the property in another build-

ing at the latter address. Marsh during the existence of the partnership, was employed on a salary as a traveling man by another company. His services for the Anzac Welding Company consisted of soliciting business for that company. Marsh testified that on March 29, he was told that the property of the firm had been moved, but that on that date business for his employer required his presence in Milwaukee. On March 31 Marsh went to the new place of business of the welding company on Milwaukee Avenue. The testimony of Marsh and Pohren is in opposition on the question whether the partnership on that date was by oral agreement dissolved. Pohren testified that Marsh agreed that Pohren should take the assets of the partnership, pay the debts of the firm, and Marsh would "walk out." This testimony of Pohren is categorily denied by Marsh. The question whether or not the partnership was dissolved as above indicated by the testimony of Marsh was a question of fact which the trial judge, under instructions, submitted to the jury. The verdict was for the plaintiff, and we accept it as an established fact that the partnership was dissolved on March 31 on the terms as testified to by Pohren. The action of replevin was properly brought in the name of the plaintiff, Bernard F. Pohren.

Harry T. Rush testified that the manager of the Dearborn Loan Company told him that Pohren had complained about trouble between Pohren and his partner Marsh; that the company was not satisfied with the building on Milwaukee Avenue as a location for the property. Rush also testified that he examined that building and he considered it an unsafe place for the personal property. On March 30, Rush saw Marsh and told him that he knew where the property of the firm was located and that the way to settle the matter was to go to the office of the loan company.

On April 1, all installments and interest due on the $300.00 note had been paid in full and the note had not reached maturity. On that date Rush and Marsh appeared at the office of the loan

ing at the latter address. Marsh during the existence of the partnership, was employed on a salary as a traveling man by another company. His services for the Lance Welding Company consisted of soliciting business for that company. Marsh testified that on March 31, he was told that the property of the firm had been moved, but that on that date business for his employer required his presence in Milwaukee. On March 31 Marsh went to the new place of business of the welding company on Milwaukee Avenue. The testimony of Marsh and Fohren is in opposition on the question whether the partnership on that date was by oral agreement dissolved. Fohren testified that Marsh agreed that Fohren should take the assets of the partnership, pay the debts of the firm, and Marsh would "walk out." This testimony of Fohren is categorically denied by Marsh. The question whether or not the partnership was dissolved as above indicated by the testimony of Marsh was a question of fact which the trial judge, under instructions, submitted to the jury. The verdict was for the plaintiff, and we accept it as a established fact that the partnership was dissolved on March 31 on the terms as testified to by Fohren. The action of replevin was properly brought in the name of the plaintiff, Edward E. Fohren.

Harry T. Rush testified that the manager of the Northern Loan Company told him that Fohren had complained about trouble between Fohren and his partner Marsh; that the company was not satisfied with the building on Milwaukee Avenue as a location for the property. Rush also testified that he examined that building and he considered it an unsafe place for the personal property. On cross-examination, Rush saw Marsh and told him that he knew where the property of the firm was located and that the way to settle the matter was to go to the office of the loan company.

On April 1, all instalments and interest due on the $[illegible]00 note had been paid in full and the note had not reached maturity. On that date Rush and Marsh appeared at the office of the loan

company and Rush paid the loan company $280.98 in full payment of the note. Rush testified that he received from the loan company the note, the chattel mortgage and an assignment of the mortgage. There is no evidence in the record that Rush held a license under the small loan act. Marsh testified that he feared the loan company would take action to reach his salary to pay the note; that he did not ask Rush to pay the note.

At the trial, the plaintiff having made previous request therefor of the defendant, the attorney for the defendant produced the chattel mortgage and the plaintiff introduced it in evidence. The attorney for the defendant said that he was unable to comply with the plaintiff's request for the note as he did not have it. Rush testified, as a witness for the defendant, that he had mislaid the note and could not find it after making search for it. No assignment of the mortgage, either on it, or of any character, appears in the record. Neither the note nor any secondary evidence of its terms was introduced in evidence, excepting that it appears from the mortgage that the note was payable in installments and unpaid installments were to bear 3½ per cent interest per month, as heretofore stated. It appears from the bill of exceptions that an assignment of the mortgage was introduced in evidence by the defendant as an exhibit, but the assignment is not copied in the bill. This exhibit is not before this court. The note was not before the trial court and we must decide the case here on the record which was before the trial court. We can not review the judgment of the trial court by indulging in speculations and conjectures. The question whether Rush under this state of the record became the assignee of the note and mortgage with the right to take possession of the mortgaged chattels must receive the attention of this court. However, that problem will for the present be deferred.

After Rush secured the note and mortgage he took possession of the chattels on April 1 as the alleged assignee of the note and mortgage. He testified that he moved them to his place of business

company and Rush paid the loan company $200.98 in full payment of the note. Rush testified that he received from the loan company the note, the chattel mortgage and an assignment of the mortgage. There is no evidence in the record that Rush held a license under the small loan act. Marsh testified that he feared the loan company would take action to reach his salary to pay the note; that he did not ask Rush to pay the note.

At the trial, the plaintiff having made previous request therefor of the defendant, the attorney for the defendant produced the chattel mortgage and the plaintiff introduced it in evidence. The attorney for the defendant said that he was unable to comply with the plaintiff's request for the note as he did not have it. Rush testified, as a witness for the defendant, that he had misplaid the note and could not find it after making search for it. No assignment of the mortgage, either on it, or of any character, appears in the record. Neither the note nor any secondary evidence of its terms was introduced in evidence, excepting that it appears from the mortgage that the note was payable in installments and unpaid installments were to bear 3½ per cent interest per month, as heretofore stated. It appears from the bill of exceptions that an assignment of the mortgage was introduced in evidence by the defendant as an exhibit, but the assignment is not copied in the bill. This exhibit is not before this court. The note was not before the trial court and we must decide the case here on the record which was before the trial court. We can not review the judgment of the trial court by indulging in speculations and conjectures. The question whether Rush under this state of the record became the assignee of the note and mortgage with the right to take possession of the mortgaged chattels must receive the attention of this court. However, that problem will for the present be deferred.

After Rush secured the note and mortgage he took possession of the chattels on April 1 as the alleged assignee of the note and mortgage. He testified that he moved them to his place of business

at 2035 North Western Avenue, Chicago. Pohren and his attorney, Edward Hershenson, testified that they went to 2035 North Western Avenue, on April 5 with $425.00 in cash and offered and tendered that money to Rush, which was the amount they swore Rush claimed to cover damages and costs. Pohren testified that Rush refused the money. Hershenson's testimony is more specific. He testified that Pohren told Rush that they had $425.00 that he was asking in settlement of the chattel mortgage and held the money out to Rush. That Rush replied, "I have nothing to do with it; I don't want it, and get the hell out of here." Rush denied the tender of the money and further testified that Pohren offered to give a deed to him for his equity in a cottage, the title to which was held by Pohren, and which offer of the deed Rush refused. Pohren admits offering the deed to Rush, but testified that on April 5 he made the cash offer to Rush.

On April 9 Rush sold the chattels at his place of business. Pohren testified that he had no notice of the sale excepting that he saw a notice in a newspaper stating that there would be a foreclosure sale at Rush's place on April 9. There is no other proof that Pohren had been given notice of the foreclosure sale.

Pohren and Hershenson attended the sale at Rush's place held on April 9. There is an irreconcilable conflict of the evidence whether or not Hershenson announced to those present at the sale that the sale was unlawful and that the purchaser of the chattels was buying a law suit. Also, whether or not the defendant and Carl Eckerson were present at the sale when the alleged announcement was made by Hershenson; whether Rush used force to eject Hershenson from his place of business and cursed him. Rush had the note secured by the chattel mortgage on the day of the sale and Hershenson saw it. The testimony is in strong conflict whether the note was stamped "cancelled." Rush testified that when Hershenson and Pohren left

at 2035 North Western Avenue, Chicago. Porter and his attorney, Edward Herbenson, testified that they went to 2035 North Western Avenue, on April 5 with $425.00 in cash and offered and tendered that money to Rush, which was the amount they swore Rush claimed to cover damages and costs. Porter testified that Rush refused the money. Herbenson's testimony is more specific. He testified that Porter told Rush that they had $425.00 that he was asking in settlement of the chattel mortgage and held the money out to Rush. That Rush replied, "I have nothing to do with it; I don't want it, and get the hell out of here." Rush denies the tender of the money and further testified that Porter offered to give a deed to him for his equity in a cottage, the title to which was held by Porter, and which offer of the deed Rush refused. Porter admits offering the deed to Rush, but testified that on April 5 he made the cash offer to Rush.

On April 9 Rush sold the chattels at his place of business. Porter testified that he had no notice of the sale excepting that he saw a notice in a newspaper stating that there would be a foreclosure sale at Rush's place on April 9. There is no other proof that Porter had been given notice of the foreclosure sale.

Porter and Herbenson attended the sale at Rush's place held on April 9. There is an irreconcilable conflict of the evidence whether or not Herbenson announced to those present at the sale that the sale was unlawful and that the purchaser of the chattels was buying a law suit. Also, whether or not the defendant and Earl Eckerson were present at the sale when the alleged announcement was made by Herbenson; whether Rush used force to eject Herbenson from his place of business and ousted him. Rush had the note secured by the chattel mortgage on the day of the sale and Herbenson saw it. The testimony is in strong conflict whether the note was stamped "cancelled." Rush testified that when Herbenson and Porter left

during the progress of the sale, half of the persons interested in the sale as prospective bidders also left his place of business. Rush testified that the chattels were purchased at the sale by a man, who sold them to a man by the name of Foster; that the purchaser at the sale was afraid that there had been something wrong with it; that he (Rush) bought the chattels of Foster for $270.00 which was $10.00 more than Foster paid for them.

The defendant, Youngberg, testified that on April 24, 1932, he saw a notice in a Chicago newspaper advertising a welding outfit for sale, "Apply 2035 North Western Avenue." That on about April 26, he left his home in Rockford and went to Chicago and bought the welding outfit, which includes the chattels now the subject matter of this replevin suit, from Rush for $1000.00; that Rush gave him a bill of sale for the property. Youngberg paid Rush $450.00 in cash and gave his notes, secured by a chattel mortgage on the property, for the balance of the purchase price. All of these notes executed by Youngberg have been paid by him in full.

When Youngberg bought the chattels they were in the possession of Rush. Part of them were in Rush's place of business, some in the basement, and the remainder of the property was in a garage about six blocks from Rush's place of business. It does not appear in evidence that Youngberg made any inquiry of Rush or any one else as to the title or ownership of the property. He testified that he thought Rush was the owner of the property because he placed the sale notice in the newspaper; that he thought Rush had papers to show that he was the owner of the chattels but he did not ask to see any papers showing title to the chattels in Rush. Youngberg looked at other welding outfits in Chicago which he hoped to buy for less than $1000.00. He testified that he did not know Rush and that he had never seen him before the day he first talked to him about selling the chattels.

At the close of all the evidence in the case, the trial judge, in the absence of the jury, and referring to the chattel mortgage given to the Dearborn Loan Company, by Pohren and Rush, stated as

during the progress of the sale, half of the persons interested in the sale as prospective bidders also left his place of business. Rush testified that the chattels were purchased at the sale by a man, who sold them to a man by the name of Foster; that the purchaser at the sale was afraid that there had been something wrong with it; that he (Rush) bought the chattels of Foster for $870.00 which was $10.00 more than Foster paid for them.

The defendant, Youngberg, testified that on April 24, 1952, he saw a notice in a Chicago newspaper advertising a wedding outfit for sale, "Apply 2035 North Western Avenue." Then on about April 26, he left his home in Rockford and went to Chicago and bought the wedding outfit, which includes the chattels now the subject matter of this replevin suit, from Rush for $1000.00; that Rush gave him a bill of sale for the property. Youngberg paid Rush $450.00 in cash and gave his notes, secured by a chattel mortgage on the property, for the balance of the purchase price. All of these notes executed by Youngberg have been paid by him in full.

When Youngberg bought the chattels they were in the possession of Rush. Part of them were in Rush's place of business, some in the basement, and the remainder of the property was in a garage about six blocks from Rush's place of business. It does not appear in evidence that Youngberg made any inquiry of Rush or any one else as to the title or ownership of the property. He testified that he thought Rush was the owner of the property because he placed the sale notice in the newspaper; that he thought Rush had papers to show that he was the owner of the chattels but he did not ask to see any papers showing title to the chattels in Rush. Youngberg looked at other wedding outfits in Chicago when he hoped to buy for less than $1000.00. He testified that he did not know Rush and that he had never seen him before the day he first talked to him about selling the chattels.

At the close of all the evidence in the case, the trial judge, in the absence of the jury, and referring to the chattel mortgage given to the Northern Loan Company, by Coburn and Rush, stated as

follows: "The court holds that plaintiff's exhibit 2, as offered by the defendant as an exhibit, being the chattel mortgage in question, is void, under the statute as made under Chapter 74, Section 13, regarding the loan business. The jury is to give no consideration to it." To which ruling the defendant then and there excepted.

The court, on its own motion, instructed the jury that this chattel mortgage had been stricken from the record; that said chattel mortgage "made under the Small Loan Act for the making of loans under the sum of $300, at the rate of three and one-half per cent interest per month in the hands of an assignee not licensed to make such loans, is illegal and void."

The defendant argues in this court that a note given to a licensee under the Small Loan Act, and falling within its provisions, is assignable to one not such a licensee; that the mortgage follows the note, and the assignee has the same right to foreclose the mortgage as the mortgagee. That the case should be reversed because of the above ruling of the court and the giving of the above instruction. This argument, of course, assumes that Rush was the transferee of the note, and that he had legal title to it.

Rush had no right to take the chattels out of the possession of Pohren unless the note held by the Dearborn Loan Company was transferred to Rush and he was the legal holder of the note and the note was one which could be transferred or assigned under the laws of this State. The legal transfer of the note must appear from the record--the record that was passed upon by the trial court. The negotiability of a note must appear from the terms of the note (Pflueger vs. Broadway Trust and Savings Bank, 351 Ill. 170). In this State a chattel mortgage is not assignable. (White v. Sutherland, 64 Ill., 181; Brass vs. Green, 113 Ill., App. 58). "The failure to endorse on the face of a note the fact that it is secured

follows: "The court holds that plaintiff's exhibit 3, as offered by the defendant as an exhibit, being the chattel mortgage in question, is void, under the statute as made under Chapter 74, Section 13, regarding the loan business. The jury is to give no consideration to it." To which ruling the defendant then and there excepted.

The court, on its own motion, instructed the jury that this chattel mortgage had been stricken from the record; that said chattel mortgage "made under the Small Loan Act for the making of loans under the sum of $300, at the rate of three and one-half per cent interest per month in the hands of an assignee not licensed to make such loans, is illegal and void."

The defendant argues in this court that a note given to a licensee under the Small Loan Act, and falling within its provisions, is assignable to one not such a licensee; that the mortgage follows the note, and the assignee has the same right to foreclose the mortgage as the mortgagee. That the case should be reversed because of the above ruling of the court and the giving of the above instruction. This argument, of course, assumes that Rush was the transferee of the note, and that he had legal title to it.

Rush had no right to take the chattels out of the possession of Fobren unless the note held by the Dearborn Loan Company was transferred to Rush and he was the legal holder of the note and the note was one which could be transferred or assigned under the laws of this State. The log I transfer of the note must appear from the record--the record that was passed upon by the trial court. The negotiability of a note must appear from the terms of the note (Filmeyer vs. Broadway Trust and Savings Bank, 321 Ill. 179). In this State a chattel mortgage is not assignable. (Miller vs. Sutherland, 64 Ill., 181; Gross vs. Green, 110 Ill., App. 52). "The failure to endorse on the face of a note the fact that it is secured

by a chattel mortgage invalidates the mortgage in the hands of an assignee, under Section 26 of the Chattel Mortgage Act." -- Mattoon Grocery Company vs. Stuckemeyer, 326 Ill., 602. (Chance vs. Hudson, 233 Ill. App. 542.) "The mere possession of a negotiable instrument payable to order and not indorsed by the payee is not, alone, evidence of title, either legal or equitable, in the possessor, but the burden is on the possessor to prove his equitable title by showing a delivery to him with intent to pass title."-- Elvin vs. Wuchletich, 326 Ill., 285. So far as appears in the record, Rush was guilty of a technical conversion of the chattels by taking possession thereof. Without passing on the alleged error assigned in this court and argued by the defendant, it is clear that the defendant was not prejudiced or aggrieved by the action of the trial court excluding the chattel mortgage as an exhibit for the defendant.

There is no force in the defendant's argument that the evidence preponderates in favor of the defendant that the partnership between Pohren and Marsh was not dissolved and that the court therefore erred in giving instruction numbered A.

The seller of personal property can not transfer a better title than what he has. The plaintiff was wrongfully deprived of his possession of the chattels and if the equities between him and the defendant Youngberg are equal, the holder of the legal title must prevail. One who buys personal property in reliance of the title being in the seller, solely because the property is in the possession of the seller, can not hold the property in opposition to the true owner. Klein vs. Seibold, 89 Ill., 540; Raleigh Mfg. Co., vs. Great Western Smelting, etc., Co., 227 Ill. App. 221.

We find no reversible error in this case and the judgment of the Circuit Court of Winnebago County is hereby affirmed.

Judgment affirmed.

Iowa Draft & Lumber Co. v. Hatton, 258 Ill., 502. Lawrence v. Hudson, 258 Ill. App. 242.) "The mere possession of a negotiable instrument payable to order and not indorsed by the payee is not, alone, evidence of title, either legal or equitable, in the possessor, but the burden is on the possessor to show his equitable title by showing a delivery to him with intent to pass title."-- Klein v. Hatfield, 258 Ill., 255. To the extent appears in the record, such was merely of a technical conversion of the chattels by taking possession thereof. Without passing on the alleged error assigned in this court and argued by the defendant, it is clear that the defendant was not prejudiced or aggrieved by the action of the trial court excluding the official certificate as an exhibit for the defendant.

There is no force in the defendant's argument that the evidence preponderates in favor of the defendant that the partnership between Dobson and Smith was not dissolved and that the court therefore erred in giving instruction numbered .

The seller of personal property can not transfer a better title than what he has. The plaintiff was wrongfully deprived of his possession of the chattels and if the equities between the and the defendant Youngberg are equal, the holder of the legal title must prevail. The who have personal property, in reliance on the title being in the seller, solely because the property is in the possession of the seller, can not hold the property in opposition to the true owner. Klein v. Hatfield. 77 Ill., 464; Hallett Co., Co., 94. Great Western Smelting, etc., Co., 227 Ill. 60. 77.

We find no reversible error in the case and the judgment of the Circuit Court of Winnebago County is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

8737

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. BLAINE HUFFMAN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAY 10 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8732 Agenda No. 13

In the Appellate Court of Illinois

Second District

October Term, A.D. 1933

Homer G. Sailor,
(Complainant) Appellant,

vs.

Lewellyn A. Hendee and Lila F. Hendee, his wife, and Equitable Life Assurance Society of the United States, a corporation,
(Defendants) Appellees,

Appeal from the Circuit Court of Lake County

WOLFE-P.J.

The appellant filed a bill to foreclose a mechanic's lien in the Circuit Court of Lake County, which is substantially as follows:

"The complainant shows that he is a duly licensed architect under the laws of the State of Illinois and has been engaged in the general practice of architecture for the past fourteen years.

That on the 17th day of April, 1930, and at all times since, Lewellyn A. Hendee and Lila F. Hendee, his wife, as joint tenants, owned, and still do own, the following described real estate situated in Lake County, Illinois, to-wit: The East ninety-eight and four-tents feet (E. 98.4 ft.) of the West One Hundred forty-eight and four-tenths feet (W. 148.4 ft.) of Block four (4) in Laura B. Crockett Subdivision of Section sixteen (16), Township forty-five (45), Range twelve (12), in Waukegan, Lake County, Illinois; and were about to erect certain improvements thereon, and on April 17, 1930, entered into a contract with complainant to furnish plans and specifications for the erection of a two-story brick veneer residence and two-car garage of the same type.

That pursuant to said contract, complainant laid out and drafted plans and specifications for said residence and garage and completed all the architectural service required by the terms of his employment and contract, all in compliance with the terms of the said

Gen. No. 8732 Agenda No. 15

In the Appellate Court of Illinois

Second District

October Term, A.D. 1933

Homer G. Sailor,
(Complainant) Appellant,

vs.

Appeal from the Circuit Court of Lake County

Lewellyn A. Hendee and Lila E. Hendee, his wife, and Equitable Life Assurance Society of the United States, a corporation,
(Defendants) Appellees.

WOLFE-p.1.

The appellant filed a bill to foreclose a mechanic's lien in the Circuit Court of Lake County, which is substantially as follows:

"The complainant alows that he is a duly licensed architect under the laws of the State of Illinois and has been engaged in the general practice of architecture for the past fourteen years.

That on the 17th day of April, 1930, and at all times since, Lewellyn A. Hendee and Lila E. Hendee, his wife, as joint tenants, owned, and still do own, the following described real estate situated in Lake County, Illinois, to-wit: The East ninety-eight and four-tenths feet (E. 98.4 ft.) of the West One Hundred forty-eight and four-tenths feet (W. 148.4 ft.) of Block four (4) in Lewis R. Crockett Subdivision of Section sixteen (16), Township forty-five (45), Range twelve (12), in Waukegan, Lake County, Illinois; and were about to erect certain improvements thereon, and on April 17, 1930, entered into a contract with complainant to furnish plans and specifications for the erection of a two-story brick veneer residence and tuccoer garage of the same type.

That pursuant to said contract, complainant laid out and drafted plans and specifications for said residence and garage and completed all the architectural service required by the terms of his employment and contract, all in compliance with the terms of the said

contract; that the last of the said architectural work was completed on, to-wit: December 8, 1930.

That complainant was to receive Five Hundred Dollars ($500.00) as payment therefor; that said sum for said work, plans and specifications was a fair, customary and reasonable charge at the time same was furnished; that said work, plans and specifications were done and performed in a good, workmanlike and professional manner and in conformity with said contract of hiring and employment.

That said Lewellyn A. Hendee and Lila F. Hendee, his wife, were on the date of the contract of employment aforesaid, and still are, the joint owners of the property hereinbefore described.

That the plans and specifications of complainant were used by the said Lewellyn A. Hendee and Lila F. Hendee in the erection of said building and improvements; that all said professional architectural services rendered and furnished as aforesaid, made pursuant to and under the terms of the contract aforesaid, requested, authorized and accepted, have become and are permanent and valuable improvements on said premises and have enhanced the value thereof in an amount in excess of complainant's claim for lien herein setvforth.

That on, to-wit: The 26th day of March, 1931, being within four months after the completion of the plans and specifications aforesaid, complainant filed with the clerk of the Circuit Court of Lake County, Waukegan, Illinois, within which said county the improvements are situated, a claim for lien for the sum of Five Hundred Dollars ($500.00), verified by complainant's affidavit, and containing a statement of contract and date the same was made; the balance due after allowing all credits and a sufficiently correct description of the real estate to identify same.

That the clerk of said court indorsed thereon the date of filing, viz., the 26th day of March, A.D. 1931, and made an abstract thereof in the book kept for that purpose, properly indexed, containing the name of complainant as the person filing the lien, the amount

contract; that the last of the said architectural work was completed on, to-wit: December 8, 1930.

That complainant was to receive Five Hundred Dollars ($500.00) as payment therefor; that said sum for said work, plans and specifications was a fair, customary and reasonable charge at the time same was furnished; that said work, plans and specifications were done and performed in a good, workmanlike and professional manner and in conformity with said contract of hiring and employment.

That said Lewellyn A. Hendee and Lila F. Hendee, his wife, were on the date of the contract of employment aforesaid, and still are, the joint owners of the property hereinbefore described.

That the plans and specifications of complainant were used by the said Lewellyn A. Hendee and Lila F. Hendee in the erection of said building and improvements; that all said professional architectural services rendered and furnished as aforesaid, made pursuant to and under the terms of the contract aforesaid, requested, authorized and accepted, have become and are permanent and valuable improvements on said premises and have enhanced the value thereof in an amount in excess of complainant's claim for lien herein setforth.

That on, to-wit: The 26th day of March, 1931, being within four months after the completion of the plans and specifications aforesaid, complainant filed with the clerk of the Circuit Court of Lake County, Waukegan, Illinois, within which said county the improvements are situated, a claim for lien for the sum of Five Hundred Dollars ($500.00), verified by complainant's affidavit, and containing a statement of contract and date the same was made; the balance due after allowing all credits and a sufficiently correct description of the real estate to identify same.

That the clerk of said court indorsed thereon the date of filing, viz., the 26th day of March, A.D. 1931, and made an abstract thereof in the book kept for that purpose, properly indexed, containing the name of complainant as the person filing the lien, the amount

of the lien, the names of the persons, Lewellyn A. Hendee and Lila F. Hendee, his wife, against whom the lien was filed and the description of the property charged with complainant's lien, as by the records of the Circuit Court in that behalf, or a certified copy of same, ready to be produced in court on a hearing hereof, will more fully appear; that since the filing of said lien aforesaid, no sum has been paid on account thereof.

That by mortgage, dated June 1, 1931, the said Lewellyn A. Hendee and Lila F. Hendee, his wife, conveyed said property to equitable Life Assurance Society of the United States, to secure an indebtedness of Sixteen Thousand Dollars ($16,000.00) evidenced by certain notes, and said Equitable Life Assurance Society of the United States, a corporation, as owner of said notes and mortgage, is made party defendant hereto; that the lien of said mortgage is subordinate and subject to the prior lien of complainant, herein sought to be foreclosed.

Complainant is without remedy in the premises except in a court of equity. Complainant prays that Lewellyn A. Hendee, Lila F. Hendee, his wife, and Equitable Life Assurance Society, a corporation, who are hereby made parties defendant to this bill, may be required to make full, true and direct answer to same (without oath); that complainant may be decreed to be entitled to a mechanic's lien upon the whole of the above described premises, and the improvements thereon, for the amount due complainant, pursuant to statute in such case made and provided; that the defendants, or some of them, may be decreed to pay to complainant the amount found to be due within a short day to be fixed by this Court; that in default of such payment, the premises and improvements thereon may be sold to satisfy such amount, together with cost and interest, and in case of such sale failure to redeem therefrom, pursuant to law, the defendants and all persons claiming by, through or under them or either of them, may be barred and foreclosed from all right and equity of redemption in

of the lien, the names of the persons, Lewellyn A. Hendee and Lila F. Hendee, his wife, against whom the lien was filed and the description of the property charged with complainant's lien, as by the records of the Circuit Court in that behalf, or a certified copy of same, ready to be produced in court on a hearing hereof, will more fully appear; that since the filing of said lien aforesaid, no part has been paid on account thereof.

That by mortgage, dated June 1, 1927, the said Lewellyn A. Hendee and Lila F. Hendee, his wife, conveyed said property to Equitable Life Assurance Society of the United States, to secure an indebtedness of Sixteen Thousand Dollars ($16,000.00) evidenced by certain notes, and said Equitable Life Assurance Society of the United States, a corporation, as owner of said notes and mortgage, is made party defendant hereto; that the lien of said mortgage is subordinate and subject to the prior lien of complainant, herein sought to be foreclosed.

Complainant is without remedy in the premises except in a court of equity. Complainant prays that Lewellyn A. Hendee, Lila F. Hendee, his wife, and Equitable Life Assurance Society, a corporation, who are hereby made parties defendant to this bill, may be required to make full, true and direct answer to same (without oath); that complainant may be decreed to be entitled to a mechanic's lien upon the whole of the above described premises, as the improvements thereon, for the amount due complainant, principal and interest in such case made and provided; that the defendants, or some of them, may be decreed to pay to complainant the amount found to be due within a short day to be fixed by this Court; that in default of such payment, the premises and improvements thereon may be sold to satisfy such amount, together with costs and interest, and in case of such sale failure to redeem therefrom, pursuant to law, the defendants and all persons claiming by, through or under them or either of them, may be barred and foreclosed from all right and equity of redemption in said

said premises; that an accounting may be taken under the direction of the Court and that a receiver be appointed to preserve the property and the interest of complainant and that complainant may have such other and further relief in the premises as to equity may appertain and to the Court shall seem meet."

To this bill the defendants, appellees, filed a general and special demurrer. The cause for special demurrer was that the terms, covenants, and provisions of the alleged contract between complainant and defendants are not set forth in said bill of complaint, nor is there a short statement thereof sufficient to advise the parties of the terms thereof; (2) that it appears from the allegations of the bill of complaint that a sum certain and definite was to be received, with the further allegation concerning a customary and reasonable charge, indicating a quantum meruit contract.

The court sustained the demurrer to this bill and the original complainant was given time within which to file an amended bill. Before the expiration of this time the complainants informed the court that they would stand by their original bill of complaint, and the court dismissed the same for want of equity, at the complainants' cost. An appeal was prayed and perfected to this court to review the sufficiency of the bill of complaint.

In the case of Hohmeier Lumber Company v. Knight, 350 Ill. 248, at page 253, the court in discussing the sufficiency of the bill to foreclose a mechanic's lien uses the following language:

"It was alleged in the original bill that Knight owned four lots setting forth their legal description; that on December 6, 1927, he made a contract by which Anderson agreed to do the carpenter work on the buildings to be erected on the lots; that on the same day the plaintiff in error entered into a subcontract with Anderson to furnish him the lumber and mill-work for the buildings, and that it completed performance of its sub-contract on November 27, 1928; that Anderson's

said premises; that an accounting may be taken under the direction of the Court and that a receiver be appointed to preserve the property and the interest of complainant and that complainant may have such other and further relief in the premises as to equity may appertain and to the Court shall seem meet."

To this bill the defendants, appellees, filed a general and special demurrer. The cause for special demurrer was that the terms, covenants, and provisions of the alleged contract between complainant and defendants are not set forth in said bill of complaint, nor is there a short statement thereof sufficient to advise the parties of the terms thereof; (3) that it appears from the allegations of the bill of complaint that a sum certain and definite was to be received, with the further allegation concerning a customary and reasonable charge, indicating a quantum meruit contract.

The court sustained the demurrer to this bill and the original complainant was given time within which to file an amended bill. Before the expiration of this time the complainants informed the court that they would stand by their original bill of complaint, and the court dismissed the same for want of equity, at the complainants' cost. An appeal was prayed and perfected to this court to review the sufficiency of the bill of complaint.

In the case of Hobsaler Lumber Company v. Knight, 380 Ill. 248, at page 253, the court in discussing the sufficiency of the bill to foreclose a mechanic's lien uses the following language:

"It was alleged in the original bill that Knight owned four lots setting forth their legal description; that on December 6, 1927, he made a contract by which Anderson agreed to do the carpenter work on the buildings to be erected on the lots; that on the same day plaintiff in error entered into a subcontract with Anderson to furnish him the lumber and mill-work for the buildings, and that it completed performance of its sub-contract on November 27, 1928; that Anderson's

indebtedness to the plaintiff in error on the sub-contract was $6550 with interest thereon from the time of its completion, and that on January 21, 1929, the plaintiff in error caused a notice of its claim and lien to be filed in the office of the registrar of titles of Cook County and entered against the certificate of title to the four lots. The bill therefore contained a brief statement of the sub-contract on which it was founded, the dates when the subcontract was made and completed, the amount due and unpaid, a description of the premises subject to the lien, and other facts necessary to a complete understanding of the rights of the parties. Although certain allegations should have been amplified and made more specific, it does not appear that a single requirement of a bill or petition prescribed by section 11 of the Mechanic's Lien act was wholly omitted." - McKeown Bros. Lumber Company v. Ogden Kennel Club, 269 Ill. App. 622.

From an examination of the bill filed in this case it is our opinion that the bill set forth every statutory requirement of the Mechanic's Lien act and fully informs the defendants of the facts that they have to meet on a hearing of the case. The objection is raised by the special demurrer with reference to the amount stated in the bill, of what the complainant's contract price was; also that the other allegations indicate that they are trying to recover on a quantum meruit.

It seems to us that this point is not well taken, because the bill states positively that there was a contract, and that the contract price was $500.00; and it further states that that price was reasonable and customary for such services.

Paragraph 2 of the bill states positively that there was a contract entered into between the complainant and the owner of the premises to draw plans and specifications for a certain designated building on the premises and said plans and specifications were used in the construction of a building on the said premises; It is our

indebtedness to the plaintiff in error on the sub-contract was $8500 with interest thereon from the time of its completion, and that on January 21, 1922, the plaintiff in error caused a notice of its claim and lien to be filed in the office of the registrar of titles of Cook County and entered against the certificate of title to the four lots. The bill therefore contained a brief statement of the sub-contract on which it was founded, the date when the subcontract was made and completed, the amount due and unpaid, a description of the premises subject to the lien, and other facts necessary to a complete understanding of the rights of the parties. Although certain allegations should have been amplified and more specific; it does not follow that a single requirement of a bill or petition or pleading by section 11 of the Mechanic's Lien act was wholly omitted." - Hixson Bros. Lumber Company v. Ogden Kennel Club, 306 Ill. 490, 492.

From an examination of the bill filed in this case it is our opinion that the bill set forth every statutory requirement of the Mechanic's Lien act and fully informed the defendants of the facts that they have to meet on a hearing of the case. The objection is raised by the special demurrer with reference to the amount stated in the bill, of what the contractor's contract price was; also that the other allegations indicate that they - [illegible] - rested on a question merit.

It seems to us that this point is not well taken; because the bill states positively that there was a [illegible] and the contract price was $600.00; and it further states that [illegible] reasonable and customary for such a [illegible].

Paragraph 3 of the bill states positively that there was a contract entered into between the complainant and the owner [illegible] premises to draw plans and specifications for a [illegible] building on the premises and that plans and specifications were used in the construction of a building on [illegible] premises. In our

opinion that this bill states a cause of action and the court erred in sustaining a demurrer to the same. The judgment of the circuit court of Lake County is hereby reversed and the case remanded to said court with directions to overrule the demurrer to the bill.

Reversed and remanded with directions.

opinion that this bill states a cause of action and the court erred in sustaining a demurrer to the same. The judgment of the circuit court of Lake County is hereby reversed and the case remanded to said court with directions to overrule the demurrer to the bill.

Reversed and remanded with directions.

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

8745

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAY 10 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8745 Ag. No. 19

In the Appellate Court of Illinois

Second District

February Term, A.D. 1934.

William F. Dixon, Administrator
do bonis non of the Estate of
Catherine Dixon, Deceased,

Plaintiff in error,

vs.

Catherine O'Brien,

Defendant in error,

Error to the Circuit Court

of Peoria County

WOLFE-P.J.

William F. Dixon, administrator de bonis non of the Estate of Catherine Dixon, deceased, started a suit in assumpsit, in the circuit court of Peoria County on the 15th day of June, 1933, against Catherine O'Brien, the defendant in error. The declaration consists of the common counts, to which was filed a plea of non-assumpsit. A jury was waived and the case was heard before the Honorable Henry J. Ingram, one of the judges of said court, on the 7th day of July, 1933. At the conclusion of the case the judge took it under advisement. On the 13th of July, 1933, he entered a finding that previous to the death of the plaintiff's intestate, the defendant was indebted in the sum of $1600.00 to said Catherine Dixon, but during the life time of plaintiff's intestate the debt of the defendant was cancelled by her and a gift thereof was made to said defendant. The court found the issues in favor of the defendant, and assessed the costs against the plaintiff. The case is brought to this court on a writ of error to review this judgment.

The evidence shows that prior to her death Mrs. Dixon lived in the City of Peoria, a short distance from the residence of her daughter, Mrs. O'Brien, the defendant in error in this suit. There is no

Gen. No. 8745 Ag. No. 19

In the Appellate Court of Illinois

Second District

February Term, A.D. 1934.

William F. Dixon, Administrator
de bonis non of the Estate of
Catherine Dixon, Deceased,

Plaintiff in error,

Error to the Circuit Court

va.

of Peoria County

Catherine O'Brien,

Defendant in error,

WOLFE-P.J.

William F. Dixon, administrator de bonis non of the Estate of Catherine Dixon, deceased, started a suit in assumpsit, in the circuit court of Peoria County on the 15th day of June, 1933, against Catherine O'Brien, the defendant in error. The declaration consists of the common counts, to which was filed a plea of non-assumpsit. A jury was waived and the case was heard before the Honorable Henry L. Ingram, one of the judges of said court, on the 7th day of July, 1933. At the conclusion of the case the judge took it under advisement. On the 15th of July, 1933, he entered a finding that previous to the death of the plaintiff's intestate, the defendant was indebted in the sum of $1800.00 to said Catherine Dixon, but during the life time of plaintiff's intestate the debt of the defendant was cancelled by her and a gift thereof was made to said defendant. The court found the issues in favor of the defendant, and assessed the costs against the plaintiff. The case is brought to this court on a writ of error to review this judgment.

The evidence shows that prior to her death Mrs. Dixon lived in the city of Peoria, a short distance from the residence of her daughter, Mrs. O'Brien, the defendant in error in this suit. There is no

dispute but that at one time Catherine Dixon loaned her daughter, Catherine O'Brien, the sum of $1600.00, and that that sum was never repaid by Mrs. O'Brien. Mrs. O'Brien defended the suit on the theory that her mother had cancelled the debt and made her a gift of the same. The plaintiff in error contends that the burden is on defendant to prove that it was a gift and that she has not proven her case by a preponderance of the evidence.

To establish his case the plaintiff in error showed that the money had been loaned by Mrs. Catherine Dixon to her daughter, Catherine O'Brien, and that the same had not been repaid. He testified to a certain conversation in which he and his sister, Mrs. Catherine O'Brien, engaged in which she acknowledged that she owned the indebtedness but claimed certain credits were due her on the same. In addition he called a witness, Nelson Miller, in his behalf, who testified that he was in the real estate business and that on March 25, 1931, he went to the home of Catherine F. Dixon for the purpose of selling her home. This question was then asked the witness: "Did Mrs. Dixon say anything about a note at that time?" To which he answered: "Mrs. Dixon told me she was not getting any interest on the $2000.00 that she had loaned her daughter and she also stated that this money that she had loaned her daughter, when she was gone, she wanted it divided equally among her children, and that the daughter was not making any payments." I said: "You have a note for this, Mrs. Dixon?" She said: "No; I have never taken a note from any of my children." An examination of this witness' evidence discloses that at no time during the conversation was Catherine O'Brien's name mentioned, or any reference made to any money which Catherine O'Brien might have owed her mother.

Catherine O'Brien was called as a witness. She testified that she gave her mother a note for $1600.00 for money that she had borrowed of her, and that she had paid interest regularly on this loan. She denied that she ever admitted to her brother that she was indebted on this note for the sum of $1600.00 or claimed credits for any amount.

dispute but that at one time Catherine Dixon loaned her daughter, Catherine O'Brien, the sum of $1800.00, and that that sum was never repaid by Mrs. O'Brien. Mrs. O'Brien defended the suit on the theory that her mother had cancelled the debt and made her a gift of the same. The plaintiff in error contends that the burden is on defendant to prove that it was a gift and that she has not proven her case by a preponderance of the evidence.

To establish his case the plaintiff in error showed that the money had been loaned by Mrs. Catherine Dixon to her daughter, Catherine O'Brien, and that the same had not been repaid. He testified to a certain conversation in which he and his sister, Mrs. Catherine O'Brien, engaged in which she acknowledged that she owed the indebtedness but claimed certain credits were due her on the same. In addition he called a witness, Nelson Miller, in his behalf, who testified that he was in the real estate business and that on March 28, 1931, he went to the home of Catherine E. Dixon for the purpose of selling her home. This question was then asked the witness: "Did Mrs. Dixon say anything about a note at that time?" To which he answered: "Mrs. Dixon told me she was not getting any interest on the $8000.00 that she had loaned her daughter and she also stated that this money that she had loaned her daughter, when she was gone, she wanted it divided equally among her children, and that the daughter was not making any payments." I said: "You have a note for this, Mrs. Dixon?" She said: "No; I have never taken a note from any of my children." An examination of this witness' evidence discloses that at any time during the conversation was Catherine O'Brien's name mentioned, or any reference made to any money which Catherine O'Brien might have owed her mother.

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She testified of caring for her mother in her last illness and her brothers offering to pay her something for that service; that at the time her mother was sick at the defendant's home, she, the mother, told the defendant's daughter, 'I want you to get that note for me and give it to me.' The daughter did, and the plaintiff's intestate marked it "paid" in front of her daughter; that later the note was destroyed by burning it in the stove; that the mother was the only one who marked it "paid"; and that she made the remark; "That is one thing that will never bother you because it is paid."

Katherine Kanive, the daughter of the defendant and a grand-daughter of Mrs. Catherine F. Dixon, testified that she knew that her grandmother loaned her mother the sum of $1600.00; that this loan was made sometime in August, 1929; that she wrote the note for her mother on the typewriter and gave it to the grandmother; that her mother signed it in her presence; that she had frequently gone through her grand-mother's papers with her and had seen the note in her grand-mother's possession; that about a month before the grandmother died she saw her grandmother take the note and write on it "paid" to Mrs. Catherine Dixon"; that Mrs. Dixon said that she wanted to destroy the note, but witness said it is better to have it just marked paid and give it to mother so she will have it to show at any time; that the grandmother remarked "All right, but I don't want to do that; I want to burn it." That the grandmother said, 'That you (meaning the witness) and Mrs. Keefe, who is an aunt of the defendant, and Dick Keefe, a cousin, are the only ones she told this to, and that you are to stand up for your mother, and she had told them to go to the front for Mrs. O'Brien.' That a few days afterwards the grand-mother said: "Ihave fooled them; I have burned those notes; I was afraid your mother might show it to them. It was none of their business what I did with the money; I burned the note. Now they will never know. I want your mother to have this money, or I would absolutely turn over in my grave if I thought one of them benefited

She testified of caring for her mother in her last illness and her brothers offering to pay her something for that service; that at the time her mother was sick at the defendant's home, she, the mother, told the defendant's daughter, 'I want you to get that note for me and give it to me.' The daughter did, and the plaintiff's intestate marked it "paid" in front of her daughter; that later the note was destroyed by burning it in the stove; that the mother was the only one who marked it "paid"; and that she made the remark; "That is one thing that will never bother you because it is paid."

Katherine Kanive, the daughter of the defendant and a grand-daughter of Mrs. Catherine T. Dixon, testified that she knew that her grandmother loaned her mother the sum of $1400.00; that this loan was made sometime in August, 1930; that she wrote the note for her mother on the typewriter and gave it to the grandmother; that her mother signed it in her presence; that she had frequently gone through her grand-mother's papers with her and had seen the note in her grand-mother's possession; that about a month before the grandmother died she saw her grandmother take the note and write on it "paid" to Mrs. Catherine Dixon"; that Mrs. Dixon said that she wanted to destroy the note, but witness said it is better to have it just marked paid and give it to mother so she will have it to show at any time; that the grandmother remarked "All right, but I don't want to do that; I want to burn it." That the grandmother said, 'That you (meaning the witness) and Mrs. Keefe, who is an aunt of the defendant, and Dick Keefe, a cousin, are the only ones she told this to, and that you are to stand up for your mother, and she had told them to go to the front for Mrs. O'Brien.' That a few days afterwards the grand-mother said: "Have fooled them; I have burned those notes; I was afraid your mother might show it to them. It was none of their business what I did with the money; I burned the note. Now they will never know. I want your mother to have this money, or I would absolutely turn over in my grave if I thought one of them benefited

five cents by that $1600.00."

Richard J. Keefe testified that he was a cousin to Catherine Dixon; that he went to visit her shortly before her death and that Mrs. Dixon told him, "I got so I could not do my own work, and I was lonesome, and I can't get along with anybody and I thought I would come out here and live; Mrs. O'Brien borrowed money off of me and I thought I would stay here until I died and her keeping me we will call it square."

Elizabeth Keefe testified that she was a sister-in-law of Catherine Dixon; that Mrs. Dixon had spoken to her frequently about the note she held of her daughter, Catherine O'Brien; that she had let her have the money to fix up her home; that Kate, that is Mrs. O'Brien, had paid the interest on it all the time, but the principal she intended to give her; she did not expect it back, she gave it to her; I don't want to tell anybody about it. That before she died she signed the note "paid" and she said, "I know that ain't a debt and she gave it to Katie, but she was going to burn it. I said, 'I would not burn it; I would let Katie keep that note.' She said, 'No, she wanted to burn it.' I went to see her again in a few days and she said, 'Well, I got that and burned it." She said, "Cousin Dick was here yesterday from Galesburg and I told him the same as I told you, that whatever money Katie owed me that she gave it to her, and that she did not want any trouble over that." She didn't think any of the rest would make any trouble over it, but if they did she wanted me and Cousin Dick to stand by her. She said that she first marked the note "paid", and when I went back in a few days she said she had burned it.

At the close of the case no propositions of law were submitted to the court. Where no propositions of law are submitted to the court trying a case without a jury, the only question to be determined on the assignment of error is whether the court erred in its rulings on the admission or refusal of evidence, and whether the competent evidence in the record sustains the judgment of the court. *- Bosley

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At the close of the case no propositions of law were submitted to the court. Where no propositions of law are submitted to the court trying a case without a jury, the only question to be determined on the assignment of error is whether the court erred in its rulings on the admission or refusal of evidence, and whether the competent evidence in the record sustains the judgment of the court. 4- Bosley

Brothers v. Lawndale Iron & Wire Works, 205 Ill. App. 602; Bione v. Bell, 221 Ill. App, 434.

The trial court had the advantage of hearing the witnesses testify, to observe them while they testified and was in a much better position than a court of review to determine what witnesses were worthy of belief and the weight that should be given to their testimony. Unless a court of review can say that the finding of the trial court is manifestly against the weight of the evidence they would not be justified in reversing the judgment. After a careful review of all the evidence in this case we are of the opinion that the court properly found that the obligation that existed between the defendant in error and her mother, Catherine F. Dixon, during her life time, had been released and discharged, and that the same was a valid gift from the mother to her daughter. The judgment of the circuit court of Peoria County should be, and is, hereby affirmed.

Judgment affirmed.

Brothers v. Lawndale Iron & Wire Works, 205 Ill. App. 502; Bione v. Bell, 221 Ill. App. 434.

The trial court had the advantage of hearing the witnesses testify, to observe them while they testified and was in a much better position than a court of review to determine what witnesses were worthy of belief and the weight that should be given to their testimony. Unless a court of review can say that the finding of the trial court is manifestly against the weight of the evidence they would not be justified in reversing the judgment. After a careful review of all the evidence in this case we are of the opinion that the court properly found that the obligation that existed between the defendant in error and her mother, Catherine F. Dixon, during her life time, had been released and discharged, and that the same was a valid gift from the mother to her daughter. The judgment of the circuit court of Peoria County should be, and is, hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAY 10 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8752 Ag. 22

In the Appellate Court of Illinois

Second District

February Term, A. D. 1934

D. L. Musselman, Treasurer of the Illinois Bi-Conference Movement,
Claimant and appellee,

vs.

The Estate of Mary Sala Olmsted,
Defendant and appellant,

Appeal from the Circuit Court of Rock Island County

WOLFE - P.J.

D. L. Musselman, as treasurer of the Illinois Bi-Conference Movement, filed a claim in the Probate Court of Rock Island County, against the estate of Mary Sala Olmsted. The claim was a written instrument executed by Mary Sala, who later married Robert W. Olmsted. The instrument is a pledge and a promise to pay to D. L. Musselman, as treasurer of said Illinois Bi-Conference Movement the sum of $5,000.00. It was made upon the condition that it should become binding only if $1,250,000.00 should be subscribed to the fund on or before July 3, 1923. The pledge provided that it should be payable on or before the decease of the maker, with interest at the rate of 1% per annum, payable semi-annually, from November 1, 1923, and any portion of the pledge remaining unpaid at the time of the maker's decease should be paid out of the proceeds of her estate. The pledge further provided that the official finding of the Executive Committee as to whether the conditions of the pledge had been met should be binding and final. Upon the back of the instrument credits to the amount of $200 was shown to have been paid in 1924, 1925, 1926 and 1927. The claim was disallowed by the Probate Court, and an appeal was taken to the Circuit Court, where a jury was waived and trial was had before the court. The court found in favor of the claimant and entered

No. 8752 Ag. 22

In the Appellate Court of Illinois

Second District

February Term, A. D. 1934

D. L. Musselman, Treasurer of
the Illinois Bi-Conference
Movement,

Claimant and appellee,

vs.

The Estate of Mary Sala Olmsted,

Defendant and appellant,

Appeal from the Circuit Court
of Rock Island County

WOLFE - P.J.

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judgment on the claim for $5,300.00. The case is brought to this court for review.

At the close of the evidence, the attorney for the estate submitted seven propositions of law to the court. The first six propositions the court refused as not being applicable to the case but held the seventh proposition submitted as being applicable. The propositions submitted are as follows: Proposition One. "The claimant must prove by the best evidence that the full amount required to be subscribed was subscribed. Two: - The provision of the contract filed with the claim in this case, to-wit: "The official findings of the executive committee as to whether the conditions of this pledge have been met, shall be binding and final," is an invalid provision in said contract and void for the reason that the same is against public policy and would oust the jurisdiction of the courts. It is also invalid for the reason that no particular executive committee is designated. Three: - In the provision of the contract on which this claim is based, to-wit: that "$1,250,000.00 shall have been subscribed to this fund on or before July 3, 1923", the word "subscribed" shall be taken in the sense of signing one's name and did not mean an oral agreement. Four:-Although the subscriptions might be taken on separate sheets of paper, yet, in order that the amounts in each could be counted in determining whether $1,250,000 was subscribed, each writing so subscribed would have to be of the same tenor and for a common object. Five:-The classes of subscription papers shown in evidence designated general pledges, endowment notes and estate notes, could not all be counted in this case to determine whether $1,250,000.00 were subscribed, for the reason that they were not of the same tenor and effect. Six:-No accountant or other competent person, may testify to the aggregate amount as shown to be subscribed in any writings until the writings themselves are properly in evidence. Seven:-Subscribers to written obligations and their representatives are released from said subscriptions, if the conditions of the subscriptions have not been fulfilled."

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The appellant assigned numerous reasons why the judgment of the circuit court should be reversed, but they fall within two general classes; First, was there proof of the execution of the note? And second, was there proof of the compliance with the conditions of the note.

We do not think that it can be successfully contended that the evidence does not conclusively show that Mary Sala Olmsted signed and delivered the note in question to the representatives of the Illinois Bi-Conference Movement. The evidence shows that she was fully advised what the paper was; that she knew the nature of the movement; that her subscription was a voluntary one; that she recognized her obligation by paying interest regularly upon the note, and so far as the evidence shows, at no time did she ever try to repudiate her contract.

It is insisted that there is no proof that the full amount of $1,250,000.00 was pledged to this Bi- Conference Movement. Mr. A. W. Wells was called as a witness in behalf of the plaintiff and identified the minutes of the executive committee. Claimant's exhibit "A" was identified and introduced in evidence. The said minutes and exhibit show clearly that the executive committee of the Illinois Bi-Conference Movement met in regular session in Peoria, Illinois, on July 17, 1933, at 11:00 A.M.; that the pledges to the Bi-Conference Movement had been audited and found to be in excess of $1,250,000.00; that said amount had been pledged prior to July 3, 1923, and that all of the conditions of such pledges had been met, and was binding upon the respective subscribers thereto. There is no dispute but what this action was taken on this date. The objection that this was not the committee authorized to ascertain and declare the amount of the pledges, and that said committee had no authority to do so, in our opinion, is not well grounded.

In addition to the action of the executive committee declaring

The appellants assigned numerous reasons why the judgment of the circuit court should be reversed, but they fall within two general classes; First, was there proof of the execution of the note? And second, was there proof of the compliance with the conditions of the note.

We do not think that it can be successfully contended that the evidence does not conclusively show that Mary Sale Olmsted signed and delivered the note in question to the representatives of the Illinois Bi-Conference Movement. The evidence shows that she was fully advised what the paper was; that she knew the nature of the movement; that her subscription was a voluntary one; that she recognized her obligation by paying interest regularly upon the note, and so far as the evidence shows, at no time did she ever try to repudiate her contract.

It is insisted that there is no proof that the full amount of $1,250,000.00 was pledged to this Bi- Conference Movement. Mr. A. W. Wells was called as a witness in behalf of the plaintiff and identified the minutes of the executive committee. Plaintiff's exhibit "A" was identified and introduced in evidence. The said minutes and exhibit show clearly that the executive committee of the Illinois Bi-Conference Movement met in regular session in Peoria, Illinois, on July 17, 1922, at 11:00 A.M.; that the pledges to the Bi-Conference Movement had been audited and found to be in excess of $1,250,000.00; that said amount had been pledged prior to July 3, 1922, and that all of the conditions of such pledges had been met, and was binding upon the respective subscribers thereto. There is no dispute but that this action was taken on this date. The objection that this was not the committee authorized to ascertain and declare the amount of the pledges, and that said committee had no authority to do so, in our opinion, is not well grounded.

In addition to the action of the executive committee declaring

that the full amount of the claims had been pledged prior to July 3, 1923 the complainant called Mr. R. A. Gates of Jacksonville, Illinois, a public accountant and auditor, who testified that he had been such public accountant and auditor since 1878; that he was called to audit the accounts of the Illinois Bi-Conference Movement in the summer of 1923; that at the time he had in his possession and control the records pertaining to such pledges; that he counted the pledges and listed the amounts thereof and ascertained the total of the same; that he checked the books, the pledges and the cash and made memoranda of his findings; that the total pledges consisted of between 25,000 and 26,000 separate pledges; that the total sum amounted to more than $1,250,000.00.

After this witness had testified Mr. D. L. Musselman, testified that the pledges and books had been in his possession but he had surrendered them to Mr. A. C. Carnine and that he held Mr. Carnine's receipt for the same. Mr. Carnine testified that the books and records of the Illinois Bi-Conference Movement had been in his possession; that he received them from Mr. Musselman; that he had looked for them in every place that he thought they might be, but was unable to find them and the same were lost.

It is seriously insisted by the appellant that the court erred in admitting Mr. Gates' testimony for the reason that the books themselves had not been introduced in evidence at the time he testified. We think the court erred in admitting this testimony before the witnesses, Mr. Musselman and Mr. Carnine, testified that the books were lost and could not be produced. This, however, is only a technical error and as the records now stand, shows that the books could not be produced. The evidence shows that many of the notes and pledges have been paid and the notes returned to the maker. The witness, Gates, did not attempt to tell the contents of any of the books or pledges, but simply testified what the aggregate amount of the pledges were. -- Hawes v. Trustees of the Wesleyan

that the full amount of the claims had been pledged prior to July 3, 1923 the complainant called Mr. R. A. Gates of Jacksonville, Illinois, a public accountant and auditor, who testified that he had been such public accountant and auditor since 1878; that he was called to audit the accounts of the Illinois Bi-Conference Movement in the summer of 1923; that at the time he had in his possession and control the records pertaining to such pledges; that he counted the pledges and listed the amounts thereof and ascertained the total of the same; that he checked the books, the pledges and the cash and made memoranda of his findings; that the total pledges computed of between $5,000 and $6,000 separate pledges; that the total was amounted to more than $1,250,000.00.

After this witness had testified Mr. D. L. Musselman, testified that the pledges and books had been in his possession but he had surrendered them to Mr. A. G. Germine and that he held Mr. Germine's receipt for the same. Mr. Germine testified that the books and records of the Illinois Bi-Conference Movement had been in his possession; that he received them from Mr. Musselman; that he had looked for them in every place that he thought they might be, but was unable to find them and the same were lost.

It is seriously insisted by the appellant that the court erred in admitting Mr. Gates' testimony for the reason that the books themselves had not been introduced in evidence at the time he testified. We think the court erred in admitting this testimony before the witnesses, Mr. Musselman and Mr. Germine, testified that the books were lost and could not be produced. This, however, is only a technical error and as the records now stand, show that the books could not be produced. The evidence shows that many of the notes and pledges have been paid and the notes returned to the maker. The witness, Gates, did not attempt to tell the contents of any of the books or pledges, but simply testified what the aggregate amount of the pledges were. -- Howe v. Trustees of the Methodist

University, 21 App. 337. The objection that the pledges were not all taken for the same purpose is not well founded. The evidence shows that the pledges were all for the Illinois Bi-Conference Movement.

It is our opinion that the court properly held that this was a valid claim against the estate of Mary Sala Olmsted, and the propositions at law, numbers 1, 2, 3, 4, 5 and 6, submitted by the attorney for the estate, were not applicable as the law in this case.

We find no evidence of fraud or suppression of evidence, or falsification of any facts or figures in the record. Mrs. Sala, at the time she signed this contract, stated why she wanted to make a pledge to this movement. That some of the records of the Illinois Bi-Conference Movement were lost and later found does not justify the inference that the officers were trying to do anything dishonest. The record does not disclose that any of the claimants or witnesses had any financial interest whatever in the result of the suit, but were acting as representatives of the Illinois Bi-Conference Movement.

We find no reversible error in the case and the judgment of the circuit court of Rock Island County is hereby affirmed.

Judgment affirmed.

University, 21 App. 327. The objection that the pledges were not all taken for the same purpose is not well founded. The evidence shows that the pledges were all for the Illinois Bi-nonterence movement.

It is our opinion that the court properly held that this was a valid claim against the estate of Mary Sale Olmsted, and the propositions at law, numbers 1, 2, 3, 4, 5 and 6, submitted by the attorney for the estate, were not applicable as the law in this case.

We find no evidence of fraud or suppression of evidence, or falsification or any facts or figures in the record. Mrs. Sale, at the time she signed this contract, stated why she wanted to make a pledge to this movement. That some of the records of the Illinois Bi-Conference Movement were lost and never found does not justify the inference that the officers were trying to do anything dishonest. The record does not disclose that any of the claimants or witnesses had any financial interest whatever in the result of the suit, but were acting as representatives of the Illin is Conference Movement.

We find no reversible error in the case and the judgment of the circuit court of Boone County is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

8763

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

275 I.A. 641

BE IT REMEMBERED, that afterwards, to-wit: On MAY 10 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8763 Ag. No. 28.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

At the February Term, A. D. 1934.

Evelyn Mussatta,

Appellee,

vs.

Estate of Albert Kolterman,
Deceased,

Appellant.

Appeal from the Circuit Court
of LaSalle County, Illinois.

WOLFE--P.J.

Evelyn Mussatta, appellee, filed a claim in the Probate Court of LaSalle County, Illinois, for $1,004.00 against the estate of her deceased father, Albert Kolterman. The case was called for trial in the Probate Court and was dismissed without a hearing. The claimant perfected an appeal to the Circuit Court of said county. The case was tried before a jury in that court and the full amount of her claim was allowed. The court entered judgment on the verdict and from that judgment Julia Tobler, as executrix of the Last Will and Testament of her father's estate brings the case to this court on appeal.

There is very little if any dispute in regard to the facts in the case. The plaintiff called several neighbors and a brother and a sister to testify in regard to her services for her father during the last years of his life, and to what the father said relative to paying the daughter for her services.

Albert Kolterman was a farmer, but for the past few years he had lived in LaSalle in LaSalle County. He died about June 20, 1932, and left surviving him his widow and seven children, all adults, among whom are Evelyn Mussatta and the appellant, Julia

No. 8763 Ag. No. 38.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

At the February Term, A. D. 1934.

Evelyn Massette,

Appellee,

vs.

Estate of Albert Koltermen,
Deceased,

Appellant.

Appeal from the Circuit Court
of LaSalle County, Illinois.

WOLFE--P.J.

Evelyn Massette, appellee, filed a claim in the Probate Court of LaSalle County, Illinois, for $1,004.00 against the estate of her deceased father, Albert Koltermen. The case was called for trial in the Probate Court and was dismissed without a hearing. The claimant perfected an appeal to the Circuit Court of said county. The case was tried before a jury in that court and the full amount of her claim was allowed. The court entered judgment on the verdict and from that judgment Julia Tobler, as executrix of the last Will and Testament of her father's estate brings the case to this court on appeal.

There is very little if any dispute in regard to the facts in the case. The plaintiff called several neighbors and a brother and a sister to testify in regard to her services for her father during the last years of his life, and to what the father said relative to paying the daughter for her services.

Albert Koltermen was a farmer, but for the past few years he had lived in LaSalle in LaSalle County. He died about June 20, 1932, and left surviving him his widow and seven children, all adults, among whom are Evelyn Massette and the appellant, Julia

Tobler, who is executrix of the father's will. He had been in poor health for the past years and had had an attack similar to a paralytic stroke. He was also afflicted with stomach trouble, probably of a cancerous nature. Evelyn Mussatta, his daughter, left her home in Galesburg, Illinois, and went to the home of her father to care for him during the last year of his life. The witnesses testified that she did the general housework and some of the outdoor work, such as gardening, milking the cows, attending the chickens, and did the cooking for her father, and took such care of him as he needed during the year she was living with him. During the last five months of the father's life he had vomiting spells and it was necessary for Evelyn Mussatta to give him the care and attention which he needed during all that time.

Sophia Kolterman, a sister of the claimant, was called as a witness in her behalf and testified relative to the work that she had seen her sister do around the house and the care and attention that the claimant had given her father during his last illness. When she was asked whether she had ever heard her father say anything about paying the claimant for the services that she was rendering to the father, the witness answered that she had heard it several times, and especially one particular time in April, 1932. She detailed a conversation that was had in the presence of her brother William and her sister, Evelyn, and her brother Albert and her mother. She says that the father said, "If I should go to the hospital as the doctor tells me to do, I might just as well have Evelyn take care of my case; she knows just about how to take care of me and give me as good care as I would get in the hospital. He says that she ought to get at least $1000.00 for her work. It is well worth it." The claimant's brother, William, corroborated the sister in what the father said were his intentions in regard to seeing that the claimant would be compensated for the work she was doing in taking care of him. These were the only witnesses that testified relative to the value of the services rendered. Other

Tobler, who is executrix of the father's will. He had been in poor health for the past years and had had an attack similar to a paralytic stroke. He was also afflicted with stomach trouble, probably of a cancerous nature. Evelyn Massette, his daughter, left her home in Galesburg, Illinois, and went to the home of her father to care for him during the last year of his life. The witnesses testified that she did the general housework and some of the outdoor work, such as gardening, milking the cows, attending the chickens, and did the cooking for her father, and took such care of him as he needed during the year she was living with him. During the last five months of the father's life he had vomiting spells and it was necessary for Evelyn Massette to give him the care and attention which he needed during all that time.

Sophie Koltzman, a sister of the claimant, was called as a witness in her behalf and testified relative to the work that she had seen her sister do around the house and the care and attention that the claimant had given her father during his last illness. When she was asked whether she had ever heard her father say anything about paying the claimant for the services that she was rendering to the father, the witness answered that she had heard it several times, and especially one particular time in April, 1932. She detailed a conversation that was had in the presence of her brother William and her sister, Evelyn, and her brother Albert and her mother. She says that the father said, "If I should go to the hospital as the doctor tells me to do, I might just as well have Evelyn take care of my case; she knows just about how to take care of me and give me as good care as I would get in the hospital. He says that she ought to get at least $1000.00 for her work. It is well worth it." The claimant's brother, William, corroborated the sister in what the father said were his intentions in regard to seeing that the claimant would be compensated for the work she was doing in taking care of him. These were the only witnesses that testified relative to the value of the services rendered. Other

witnesses were called and stated that they had seen the claimant working at the father's place helping to care for the deceased during the year preceding his death.

Appellant seriously contends that William Kolterman and Sophia Kolterman were incompetent witnesses on behalf of the claimant by reason that they are interested parties to the suit. In proving a claim against an estate the heirs at law are competent witnesses to testify upon behalf of the claimant, if their testimony is adverse to their own interests. In this case Albert Kolterman and Sophia Kolterman were both testifying against their own interests, for if the claim is allowed their share of the estate would contribute towards the payment of this claim. The objection to the competency of these two witnesses is not well founded.

Where one person, not a relative renders service to another with the assent and approval of the person for whom they are rendered the law raises an implied promise to pay for the services, but, where the family relation exists, such implication does not arise from the mere rendition of the services, and in that case it will be presumed that the services were rendered as a gratuity, on account of the mutual obligation existing between the parties growing out of family relationship. Such presumption is, however, rebutted where the evidence establishes an express contract or promise to pay for the services, or where, from the facts proven it appears that at the time the services were performed both parties understood and expected that the party performing the services was to compensate therefor, although no express contract to pay for the service is proven, in which case a contract will be raised by implication of law to pay for such services.-- Switzer vs. McKee, 146 Ill. 577; Neish vs. Gannon, 198 Ill. 219. Both sides to this litigation admit this to be law, but the appellants claim there has been no promise proven on behalf of the testator to pay for the services that the claimant rendered to the father. It is undisputed that the father repeatedly said that he would rather have his daughter

witnesses were called and stated that they had seen the claimant working at the father's place helping to care for the deceased during the year preceding his death.

Appellant seriously contends that William Holterman and Sophia Holterman were incompetent witnesses on behalf of the claimant by reason that they are interested parties to the suit. In proving a claim against an estate the laws of law are competent witnesses to testify upon behalf of the claimant, if their testimony is adverse to their own interests. In this case Albert Holterman and Sophia Holterman were both testifying against their own interests, for if the claim is allowed their share of the estate would contribute towards the payment of this claim. The objection to the competency of these two witnesses is not well founded.

Where one person, not a relative rendered service to another with the assent and approval of the person for whom they are rendered the law raises an implied promise to pay for the services, but, where the family relation exists, such implication does not arise from the mere rendition of the services, and in that case it will be presumed that the services were rendered as a gratuity, on account of the mutual obligation existing between the parties growing out of family relationship. Such presumption is, however, rebutted where the evidence establishes an express contract or promise to pay for the services, or where, from the facts shown it appears that at the time the services were performed both parties understood and expected that the party performing the services was to compensate therefor, although no express contract to pay for such service is proven, in which case a contract will be raised by implication of law to pay for such services.-- Whitney vs. Cox, 141 Ill. 77; Nelan vs. Cannon, 160 Ill. 214. Even when to this implication admit this to be law, but the specific rule cited has been no promise proven on behalf of the testator to pay for the services that the claimant rendered to his father. It is undisputed that the father repeatedly said that he would rather have his daughter

Evelyn take care of him at home and that she could render him better service than a nurse at a hospital; and that he would rather be at home than at a hospital; that it would cost him at least a thousand dollars to go to the hospital to be cared for and that he would rather pay the money to Evelyn than to the hospital so that she would get the benefit, and it was well worth a thousand dollars for the work she was doing. These statements indicate a positive intention on the part of the father to pay his daughter for the services that she was performing and had performed, and that he anticipated would be necessary for her to perform during his illness. We see no reason why the father could not indicate the amount that he was to pay for such services, and he fixed the value here at one thousand dollars.

The appellants raise the point of variance between the proof given and the claim filed against the estate; that the claim filed is for work and labor performed at so much per day, itemizing the days that she performed such services, making a total of $1004.00. There is a technical variance between the proof and the claim filed, but in our opinion it is such a variance that is not material to the issues in this case, and a slight variance in character which does not result in prejudice to the parties should not be ground for a reversal of the case. -- First National Bank of Atwood vs. Green 130 Ill. App., 60, Pryde vs. Chicago-Sandocal Company, 210 Ill. App., 615.

The appellant claims that the trial court erred in refusing to give proper instructions requested by the appellant. The appellant in his printed argument does not point out wherein the Court erred in refusing the instruction, it is therefore considered waived in this court.

We find no reversible error in this case and the judgment of the Circuit Court of LaSalle County is hereby affirmed.

Affirmed.

Evelyn take care of him at home and that she could render him better service than a nurse at a hospital; and that he would rather be at home than at a hospital; that it would cost him at least a thousand dollars to go to the hospital to be cared for and that he would rather pay the money to Evelyn than to the hospital so that she could get the benefit, and it was well worth a thousand dollars for the work she was doing. These statements indicate a positive intention on the part of the father to pay his daughter for the services that she was performing and had performed, and that no antidotes would be necessary for her to perform during his illness. We see no reason why the father could not indicate the amount that he was to pay for such services, and be fixed the value here at one thousand dollars.

The appellants raise the point of variance between the proof given and the claim filed against the estate; that the claim filed is for work and labor performed at so much per day, itemizing the days that she performed such services, making a total of $1001.00. There is a technical variance between the proof and the claim filed, but in our opinion it is such a variance that is not material to the issues in this case, and a slight variance in character which does not result in prejudice to the parties should not be ground for a reversal of the case. -- First National Bank of Atwood vs. Green 130 Ill. App., 60; Hyde vs. Chicago-Sanitary Company, 210 Ill. 'pp., 218.

The appellant claims that the trial court erred in refusing to give proper instructions requested by the appellant. The appellant in his printed argument does not point out wherein the court erred in refusing the instruction, it is therefore considered waived in this court.

We find no reversible error in this case and the judgment of the Circuit Court of Lasalle County is hereby affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

877

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. BLAINE HUFFMAN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAY 10 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A. D. 1934.

City Trust & Savings Bank of
Kankakee, et al.,

vs.

John H. Ader, et al.

--

Jay Lane and Hannah Lane
(Hannah Lane, Individually and
as Executrix of the Last Will
and Testament of Jay Lane,
Deceased,)
Appellants

vs.

City Trust & Savings Bank of
Kankakee, et al.,
Appellees.

Appeal from Circuit
Court of Iroquois
County.

WOLFE-- P.J.

On September 1, 1925, John Ader and Mary Ader, his wife, executed a deed of trust on certain premises in the village of Chebanse, Iroquois County, Illinois, to secure the payment of a note of $3,600.00 of even date, payable to the order of John H. Ader, endorsed and delivered by said John H. Ader to the said trust and savings bank of Kankakee, Illinois. Default having been made in payments on this note the bank and H. M. Stone as trustee filed their bill to foreclose their said deed of trust on May 19, 1930. On October 20, 1930, Jay Lane and Hannah Lane,his wife, filed an intervening petition in said foreclosure suit and each of them alleged that John H. Ader and Mary Ader,his wife, are not the owners of the premises conveyed by the deed of trust, but that the Lanes are the owners of these premises. The petition further alleges that they entered into a written contract for the sale of said property prior to October 5, 1923, by the provision of which the aders were not to receive title to the premises until they had

No. 8772 Ag. 34

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A. D. 1934.

City Trust & Savings Bank of
Kankakee, et al.,

vs.

John H. Ader, et al.

--

Jay Lane and Hannah Lane
(Hannah Lane, individually and
as Executrix of the last will
and Testament of Jay Lane,
Deceased,)
Appellants

vs.

City Trust & Savings Bank of
Kankakee, et al.,
Appellees.

Appeal from Circuit
Court of Iroquois
County.

WOLFE-- P.J.

On September 1, 1922, John Ader and Mary Ader, his wife, executed a deed of trust on certain premises in the village of Chebanse, Iroquois County, Illinois, to secure the payment of a note of $3,000.00 of even date, payable to the order of John H. Ader, endorsed and delivered by said John H. Ader to the said trust and savings bank of Kankakee, Illinois. Default having been made in payments on this note the bank and M. M. Stone as trustee filed their bill to foreclose their said deed of trust on May 19, 1930. On October 20, 1930, Jay Lane and Hannah Lane, his wife, filed an intervening petition in said foreclosure suit and each of them alleged that John H. Ader and Mary Ader, his wife, are not the owners of the premises conveyed by the deed of trust, but that the Lanes are the owners of those premises. The petition further alleges that they entered into a written contract for the sale of said property prior to October 5, 1922, by the provision of which the aders were not to receive title to the premises until they had

made the last payment thereon. That the Aders had not made the total payments and that the Lanes held their note for such payments, which amounted to the sum of $1000.00, and for this reason the Lanes had never conveyed the premises to the Aders.

The petition further stated that upon investigation, beginning after the foreclosure suit was instituted, the Lanes discovered that Ader claimed to have secured the title by two warranty deeds purported to have been executed by the Lanes, one of which was dated and acknowledged on October 5, 1923, and recorded October 8, 1923. The other dated and acknowledged on November 7, 1923 and recorded on November 8, 1923. The second deed recites that it was given to correct a former deed. The intervening petition was sworn to by Jay Lane and Hannah Lane and they denied they had ever executed either of said deeds and insisted that they had never at any time conveyed the property to Ader. The Lanes were allowed to file their intervening petition and were permitted to become parties defendant, and filed their answer to the original bill and the cross-bill in which the same allegations were as set forth in their intervening petition. On the hearing of the case the cross-bill was dismissed for want of equity, and the Court entered a decree granting the original complainants the relief as prayed for in their bill. From this decree the case is brought to this Court on appeal.

The disputed question in this case is whether Jay Lane and Hannah Lane, his wife, executed the two deeds as set forth conveying this property to Ader. The complainants to sustain their case introduced in evidence their note and trust deed. H. H. Wheeler, solicitor for the complainant, testified to the amount due and unpaid on the note together with interest thereon; and the amount of reasonable solicitor's fee for the complainant in the prosecution of the suit. This was all the evidence offered on behalf of the complainant in their case in chief. On behalf of the cross-complainant, Mrs. Hannah Lane was called and testified that she and her husband

made the last payment thereon. That the Aders had not made the total payments and that the Lanes held their note for such payments, which amounted to the sum of $1000.00, and for this reason the Lanes had never conveyed the premises to Mr. Ader.

The petition further stated that upon investigation, beginning after the foreclosure suit was instituted, the Lanes discovered that Ader claimed to have secured the title by two warranty deeds purported to have been executed by the Lanes, one of which was dated and acknowledged on October 5, 1922, and recorded October 9, 1923. The other dated and acknowledged on November 7, 1923 and recorded on November 9, 1923. The second deed recites that it was given to correct a former deed. The intervening petition was sworn to by Jay Lane and Ben Lane and they denied they had ever executed either of said deeds and insisted that they had never at any time conveyed the property to Ader. The Lanes were allowed to file their intervening petition and were permitted to become parties defendant, and filed their answer to the original bill and the cross-bill in which the same allegations were as set forth in their intervening petition. On the hearing of the case the cross-bill was dismissed for want of equity, and the Court entered a decree granting the original complainants the relief as prayed for in their bill. From this decree the case is brought to this Court on appeal.

The disputed question in this case is whether Jay Lane and Hannah Lane, his wife, executed the two deeds as set forth conveying this property to Ader. The complainants to sustain their case introduced in evidence their note and trust deed. H. L. Wheeler, solicitor for the complainant, testified to the amount due and unpaid on the note together with interest thereon; and the amount of reasonable solicitor's fee for the complainant in the prosecution of the suit. This was all the evidence offered on behalf of the complainant in their case in chief. On behalf of the cross-complainant, Mrs. Hannah Lane was called and testified that she and her husband

had a deal with J. H. Ader; that he came to them and wanted to buy their property; that her husband at the time of the hearing was dead; that he died on January 6, 1933; that she remembered signing a contract in which her husband and she agreed to deed to ~~the~~ John H. Ader, the property in question on payment to them of the sum of $5500.00; that Ader paid $4500.00 and that he still owes them $1000.00 and interest on the contract; that they have a note of John H. Ader's for the same. She identified the note which was introduced in evidence. She further testified that she did not know there was a mortgage on the property until after the foreclosure suit had been started; that she searched for the contract concerning the sale of the property but was unable to find it; that she never signed any deed conveying this property to J. H. Ader; that her signature to the same is not her handwriting and the signatures of Jay Lane on said deeds is not the signature of her husband, Jay Lane; that they delivered possession of the premises to the Aders shortly after the contract of purchase was entered into; that the Aders moved out of the premises about three and one-half or four years ago; that she and her husband took possession of the property after the Aders moved out and they have been living in the same ever since that time; that she and her husband had paid the taxes on the premises since Ader abandoned it.

The two deeds purporting to convey the premises by the Lanes to Ader were admitted in evidence. Raynold Ader was called on behalf of the cross complainant and testified that he had known Jay Lane and Hannah Lane all his life; that he also knew John H. Ader and was related to him. On being shown the deed, the cross-complainants' exhibit 3, which purported to be a deed from the cross-complainants to Ader and purported to have been signed by them before him as a Notary Public, he stated he had no recollection about the acknowledgment, or of the Lanes' signing the deed. George W. Lane, a nephew of Jay Lane, was called as a witness and testified that he had done business with Jay Lane for over 30 years and that he knows

had a deal with J. H. Ader; that he came to them and wanted to buy their property; that her husband at the time of the hearing was dead; that he died on January 6, 1933; that she remembered signing a contract in which her husband and she agreed to deed to the John H. Ader, the property in question on payment to them of the sum of $5500.00; that Ader paid $4500.00 and that he still owes them $1000.00 and interest on the contract; that they have a note of John H. Ader's for the same. She identified the note which was introduced in evidence. She further testified that she did not know there was a mortgage on the property until after the foreclosure suit had been started; that she searched for the contract concerning the sale of the property but was unable to find it; that she never signed any deed conveying this property to J. H. Ader; that her signature to the same is not her handwriting and the signatures of Jay Lane on said deeds is not the signature of her husband, Jay Lane; that they delivered possession of the premises to the Aders shortly after the contract of purchase was entered into; that the Aders moved out of the premises about three and one-half or four years ago; that she and her husband took possession of the property after the Aders moved out and they have been living in the same ever since that time; that she and her husband had paid the taxes on the premises since Ader abandoned it.

The two deeds purporting to convey the premises by the Lanes to Ader were admitted in evidence. Reynold Ader was called on behalf of the cross complainant and testified that he had known Jay Lane and Hannah Lane all his life; that he also knew John H. Ader and was related to him. On being shown the deed, the cross-complainants' exhibit 3, which purported to be a deed from the cross-complainants to Ader and purported to have been signed by them before him as a Notary Public, he stated he had no recollection about the acknowledgement, or of the Lanes' signing the deed. George W. Lane, a nephew of Jay Lane, was called as a witness and testified that he had done business with Jay Lane for over 30 years and that he knows

his Uncle's signature and that many many times he had seen him write his name that Jay Lane had purchased material many times from his firm, and had issued many checks in payment thereof. He had seen him write his name many times, and was familiar with his signature. He testified positively that the signature of Jay Lane to the two deeds was not the true signature of Jay Lane.

Rose Bergen called on behalf of the cross-complainants, testified that she knew Jay Lane and was acquainted with his signature and that the name, Jay Lane, on the two exhibits is not the true signature of Jay Lane. J. C. McMahon, testified that he had known Jay Lane for fifty years; that he had bought grain many times from Mr.Lane and had other business relations with him; that he had occasion to see his signature or handwriting frequently and was familiar with the same and that the signature to the two exhibits is not the true signature of Jay Lane.

In rebuttal the complainant called Carl T. Porch who testified that one time he was a notary public and had a seal, and during such time he took acknowledgment of the deed; that he saw them sign the deeds,known as cross-complainant's exhibit two, in his presence and that he took acknowledgment of the same. John H. Ader was called on behalf of both complainant and cross-complainants and he testified that he bought the property for $5500.00; that there was still due the Lane's $1000.00 on the purchase price; he testified that he asked Mr. Lane for a deed and Mr. Lane told him he would not give him a deed until he had made the last payment.

It is hard to conceive why the Lanes would give Ader a deed for this property when it was admitted that Ader still owed $1000.00 on the contract. From an examination of this evidence we are of the opinion that the evidence strongly preponderates in favor of cross-complainant; that they did not sign or deliver the two deeds in question, and at the time John H. Ader executed the trust deed and note in question, that he had no title to the premises; and that the

his Uncle's signature and that many times he had seen him write his name that Jay Lane had purchased material many times from his firm, and had issued many checks in payment thereof. He had seen him write his name many times. He was familiar with his signature. He testified positively that the signature of Jay Lane to the two deeds was not the true signature of Jay Lane.

Rose Sorgen called on behalf of the cross-complainants, testified that she knew Jay Lane and was acquainted with his signature and that the name, Jay Lane, on the two exhibits is not the true signature of Jay Lane. J. C. Sorgen, testified that he had known Jay Lane for fifty years; that he had bought grain many times from Mr.Lane and had other business relations with him; that he had occasion to see his signature or handwriting frequently and was familiar with the same and that the signature to the two exhibits is not the true signature of Jay Lane.

In rebuttal the complainant called Earl T. Torson who testified that one time he was a notary public and had a seal, and during such time he took acknowledgment of the deed; that he saw them sign the deeds,known as cross-complainant's exhibit two, in his presence and that he took acknowledgment of the same. John W. Adar was called on behalf of both complainant and cross-complainants and he testified that he bought the property for $3000.00; that there was still due the Lane's $1000.00 on the purchase price; he testified that he asked Mr. Lane for a deed and Mr. Lane told him he would not give him a deed until he had made the last payment.

It is hard to conceive why the Lanes would give her a deed for this property when it was admitted that Adar still owed $1000.00 on the contract. From an examination of the evidence we are of the opinion that the evidence strongly preponderates in favor of cross-complainants; that they did not sign or deliver the two deeds in question, and at the time John W. Adar executed the trust deed and note in question, that he had no title to the premises; and the

court erred in dismissing the cross-bill for want of equity and entering a decree of foreclosure in favor of the complainant.

The decree of the Circuit Court of Iroquois County is hereby reversed and the case remanded to said court with directions to dismiss the original bill for want of equity and to grant cross-complainants the relief prayed for in their cross-bill.

Reversed and remanded with directions.

court erred in dismissing the cross-bill for want of equity and entering a decree of foreclosure in favor of the complainant.

The decree of the Circuit Court of Iroquois County is hereby reversed and the case remanded to said court with directions to dismiss the original bill for want of equity and to grant cross-complainants the relief prayed for in their cross-bill.

Reversed and remanded with directions.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

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32 H

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAY 10 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8777 Ag. 37

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A. D. 1934

E. M. Jenkins,

Appellee,

vs.

N. J. Modaff,

Appellant.

Appeal from City Court of Aurora.

WOLFE--P.J.

E. M. Jenkins, appellee, sought to recover damages for injuries alleged to have been received on July 13, 1931. He started suit in the City Court of Aurora, June 17, 1932. The original declaration consisted of four counts. The first one charged that appellant was engaged in the grocery business and used several trucks to deliver groceries to his customers; that the appellee was riding a bicycle south on LaSalle Street, in Aurora, on the westerly side thereof; that appellant's agent, or servant, whose name was unknown to the appellee struck appellee's bicycle a violent blow and damaged it; that by means of said collision appellee was thrown to the ground and received injuries, underwent pain and sustained damages.

Count four charges that while the appellee was proceeding in a southerly direction on LaSalle Street, just north of the intersection of LaSalle and Benton Streets, appellant's truck, operated by a person unknown to the appellee, turned abruptly and failed to give appellee due notice of turning west onto Benton Street, and by reason thereof appellee was injured and unable to pursue his usual occupation because

No. 8777 Ge. 57

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A. D. 1954

E. M. Jenkins,

Appellee,

vs.

W. J. Modaff,

Appellant.

Appeal from City Court
of Aurora.

WOLFE--P.J.

E. M. Jenkins, appellee, sought to recover damages for injuries alleged to have been received on July 15, 1951. He started suit in the City Court of Aurora, June 17, 1952. The original declaration consisted of four counts. The first one charged that appellant was engaged in the grocery business and used several trucks to deliver groceries to his customers; that the appellee was riding a bicycle south on Lasalle Street, in Aurora, on the westerly side thereof; that appellant's agent, or servant, whose name was unknown to the appellee struck appellee's bicycle a violent blow and damaged it; that by means of said collision appellee was thrown to the ground and received injuries, medicaent pain and sustained damages.

Count four charges that while the appellee was proceeding in a southerly direction on Lasalle Street, just north of the intersection of Lasalle and Benton Streets, appellant's truck, operated by a person unknown to the appellee, turned abruptly and failed to give appellee due notice of turning west onto Benton Street, and by reason thereof appellee was injured and unable to pursue his usual occupation because

the operator of said truck, who was then and there, and as the appellee is informed and believes the agent of the appellant, gave him no notice of turning as required by statute. At the trial of the case the appellee dismissed the third count of his declaration and the court upon appellant's motion struck count two from the declaration. So those counts are not before this court for our consideration. Over the objection of the appellant the appellee was granted leave of court, to amend counts one and four on the face of the declaration. Count four was amended on two occasions. At the close of the plaintiff's case, and also at the close of all the evidence, the defendant, now appellant, interposed proper motions to exclude the evidence from the jury and to direct the jury to find the issues for the defendant. These several motions were refused. The case proceeded to trial and the jury found the issue in favor of the plaintiff and assessed his damage at $5,000.00.

It is first insisted by the appellants that neither count one nor four of the plaintiff's declaration state a cause of action and if they state a cause of action, there is not sufficient proof to warrant the case being submitted to a jury. After an examination of these two counts of the declaration we are of the opinion that they do state a cause of action and that there was sufficient proof offered in support thereof, and that the court did not err when it refused to direct a verdict in favor of the defendant.

It is next insisted by the appellant that the court erred in admitting improper evidence on behalf of the appellee. Counsel for the appellee repeatedly brought to the attention of the jury that Dr. Karl J. Kaiser was the County Physician for the township and also the physician who was called to

the operator of said truck, who was then and there, and as the appellee is informed and believes the agent of the appellant, gave him no notice of turning as required by statute.

At the trial of the case the appellee dismissed the third count of his declaration and the court upon appellant's motion struck count two from the declaration. So those counts are not before this court for our consideration. Over the objection of the appellant the appellee was granted leave of court, to amend counts one and four on the face of the declaration. Count four was amended on two occasions. At the close of the plaintiff's case, and also at the close of all the evidence, the defendant, now appellant, interposed proper motions to exclude the evidence from the jury and to direct the jury to find the issues for the defendant. These several motions were refused. The case proceeded to trial and the jury found the issue in favor of the plaintiff and assessed his damage at $2,000.00.

It is first insisted by the appellants that neither count one nor four of the plaintiff's declaration state a cause of action and if they state a cause of action, there is not sufficient proof to warrant the case being submitted to a jury. After an examination of these two counts of the declaration we are of the opinion that they do state a cause of action and that there was sufficient proof offered in support thereof, and that the court did not err when it refused to direct a verdict in favor of the defendant.

It is next insisted by the appellant that the court erred in admitting improper evidence on behalf of the appellee. Counsel for the appellee repeatedly brought to the attention of the jury that Dr. Karl J. Kaiser was the County Physician for the township and also the physician who was called to

treat the plaintiff when he was injured. It seems to us that there is unnecessary repetition in calling the attention of the jury to the fact that the plaintiff went to the County Physician to be treated, and that it was error for the court to allow such reference and testimony. On cross-examination of Walter Blank and Roy Potteiger, drivers of defendant's trucks, in July, 1931, appellee brought out the fact that they had each had accidents while driving trucks of the defendant. We do not see how the accidents that these two men may have had with defendant's trucks tended to prove the negligence of the defendant in this case, but it did have a tendency to prejudice the jury against the defendant.-- Tuthill vs. The Belt Railroad Company, 145 Ill. App. pp. 50. There are numerous other objections to the testimony on behalf of the plaintiff but as this case will have to be reversed and remanded, we will not comment upon those objections.

Complaint is made that the court erred in giving the plaintiff's peremptory instruction number 8-A at the request of the plaintiff which is as follows: "The court instructs the jury that if you believe from a preponderance of the evidence under the instructions of the court that the person operating the automobile truck in question was the agent or servant of the defendant and that the defendant, by his agent or servant, in the driving, management and operation of his automobile at and before the time of the collision in question, under all the facts and circumstances in evidence was guilty of the negligence charged in Counts I and IV of plaintiff's declaration, or either of said counts, and that the collision in question was the result of such negligence, if any, the plaintiff was injured and damaged as charged in either or both of said counts of his declaration and if you further believe from a preponderance of the evidence that the plaintiff, at and before the time of said collision, exercised ordinary care for his own safety, then in such case

treat the plaintiff when he was injured. It seems to us that there is unnecessary repetition in calling the attention of the jury to the fact that the plaintiff went to the County Physician to be treated, and that it was error for the court to allow such reference and testimony. On cross-examination of Walter Blank and Roy Potteiger, drivers of defendant's trucks, in July, 1931, appellee brought out the fact that they had each had accidents while driving trucks of the defendant. We do not see how the accidents that these two men may have had with defendant's trucks tended to prove the negligence of the defendant in this case, but it did have a tendency to prejudice the jury against the defendant.-- Tuthill vs. The Bell Railroad Company, 160 N.Y. 4 p. 59. There are numerous other objections to the testimony on behalf of the plaintiff but as this case will have to be reversed and remanded, we will not comment upon those objections.

Complaint is made that the court erred in giving the plaintiff's peremptory instruction number 8-- at the request of the plaintiff which is as follows: "The court instructs the jury that if you believe from a preponderance of the evidence under the instructions of the court that the driver operating the automobile truck in question was the agent or servant of the defendant and that the defendant, by his agent or servant, in the driving, management and operation of the automobile at and before the time of the collision in question, under all the facts and circumstances in evidence was guilty of the negligence charged in Counts I and IV of plaintiff's declaration, or either of said counts, and that the collision in question was the result of such negligence, if any, then plaintiff was injured as charged in either or both of said counts of the declaration and if you further believe from a preponderance of the evidence that the plaintiff, at and before the time of said collision, exercised ordinary care for his own safety, and in any case

you should find the defendant guilty."

This court had occasion to pass upon the same instruction in the case of Schwartz vs. The Chicago Northwestern R.R. Co., 237 App. pp. 660. In this opinion we said: "There is no showing that the declaration went to the jury and it will be presumed in the absence of such showing that the court did not permit the pleadings to be taken by the jury, when they retired to consider their verdict. Benier vs. Illinois C. C. R.R. Co. 296 Ill. 464; Lerette vs.Director General of Railroads 306 Ill. 348-355. There is no other instruction in the case which tells the jury what negligence is charged in plaintiff's declaration. An instruction which directs a verdict must limit the jury to the negligence charged in the declaration. Herring vs. C & A. R.R. Co., 299 Ill. 214. If the jury did not know what negligence was charged in the declaration, it was not limited by this instruction and might find the defendant guilty of negligence not charged in the declaration. The instruction is therefore erroneous in that particular and the giving of such instruction is held to be reversible error where the evidence is close and conflicting--Ratner vs. Chicago Railway Co. 233 Ill. 169; Hackett vs. Chicago City Railway Co. 235 id. 116; Lyons vs. Ryerson & Son, 242 id., 409; Grifen vs. Chicago Railway Co. 299 id. 590.

It will be observed that the instruction given by the Court directs a verdict. The evidence in this case is very conflicting and the instructions should be accurate. There is nothing in any of the instructions telling or advising the jury with what negligence the defendant is charged. The attorneys for the appellee urge as an answer to the failure in this respect that the jury was amply advised of what negligence was charged against the defendant by the opening statements made to the jury by the respective attorneys for the parties. This does not cure the defect in the instructions, as the statements made by the

you should find the defendant guilty."

This court had occasion to pass upon the same instruction in the case of Schwartz vs. The Chicago Northwestern R.R. Co., 237 App. pp. 660. In this opinion we said: "There is no showing that the declaration went to the jury and it will be presumed in the absence of such showing that the court did not permit the pleadings to be taken by the jury, when they retired to consider their verdict. Benter vs. Illinois C. C. R.R. Co. 296 Ill. 464; Lerette vs. Director General of Railroads 306 Ill. 348-355. There is no other instruction in the case which tells the jury what negligence is charged in plaintiff's declaration. An instruction which directs a verdict must limit the jury to the negligence charged in the declaration. Herring vs. C. & A. R.R. Co., 292 Ill. 214. If the jury did not know what negligence was charged in the declaration, it was not limited by this instruction and might find the defendant guilty of negligence not charged in the declaration. The instruction is therefore erroneous in that particular and the giving of such instruction is held to be reversible error where the evidence is close and conflicting--Hatter vs. Chicago Railway Co. 202 Ill. 160; Hockett vs. Chicago City Railway Co. 229 id. 116; Lyons vs. Syverson & Son, 242 id., 402; Grifen vs. Chicago Railway Co. 292 id. 590.

It will be observed that the instruction given by the Court directs a verdict. The evidence in this case is very conflicting and the instructions should be accurate. There is nothing in any of the instructions telling or advising the jury with what negligence the defendant is charged. The attorney for the appellee urge as an answer to the failure in this respect that the jury was amply advised of what negligence was charged against the defendant by the opening statement made to the jury by the respective attorneys for the parties. This does not cure the defect in the instructions, as the statements made by the

attorneys are not evidence of or any proof of negligence charged against the defendant in the pleadings. It is our opinion that it was reversible error for the court to give this instruction.

Complaint is made that the judge left the bench during the closing argument to the jury, and that during the judge's absence from the courtroom counsel for the defendant made improper arguments, and presented to the jury a memoranda which had not been admitted in evidence. Whether the record does or does not show that the trial judge was absent from the courtroom is immaterial, it does show that he was absent from the bench and during such absence there was a controversy in regard to the argument of Mr. Wing, one of the attorneys for the plaintiff. One of the disputed questions in the case was the identity of the truck which caused the injury to the plaintiff. It was highly improper for the attorney to exhibit before the jury the paper and to tell the jury that the license number was then and there in the handwriting of the plaintiff, as a certain witness, Kline, had given it to him, when the writing itself was not in evidence. For the reasons above stated the judgment of the City Court of Aurora is hereby reversed and the cause is remanded to said court.

Reversed and remanded.

attorneys are not evidence of or any proof of negligence charged against the defendant in the pleadings. It is our opinion that it was reversible error for the court to give this instruction.

Complaint is made that the judge left the bench during the closing argument to the jury, and that during the judge's absence from the courtroom counsel for the defendant made improper arguments, and presented to the jury a memorandum which had not been admitted in evidence. Whether the record does or does not show that the trial judge was absent from the courtroom is immaterial, it does show that he was absent from the bench and during such absence there was a controversy in regard to the argument of Mr. Wing, one of the attorneys for the plaintiff. One of the disputed questions in the case was the identity of the truck which caused the injury to the plaintiff. It was highly improper for the attorney to exhibit before the jury the paper and to tell the jury that the license number was then and there in the handwriting of the plaintiff, as a certain witness, Milne, had given it to him, when the writing itself was not in evidence. For the reasons above stated the judgment of the City Court of Aurora is hereby reversed and the cause is remanded to said court.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. BLAINE HUFFMAN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAY 10 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8592 Agenda No. 36

In the Appellate Court of Illinois

Second District

October Term, A.D. 1932.

E. D. Webb,

appellee,

vs.

B. A. Knight,

appellant,

Appeal from the County Court of Winnebago County

DOVE- J:

This was an action of debt, instituted by appellee against appellant, B. A. Knight, and the McNair and Dudley Building Corporation, an Illinois corporation. A summons was issued against both defendants, but only appellant was served, and he challenged the sufficiency of the declaration by a general demurrer, which was overruled, and having elected to abide by his demurrer, a judgment was rendered in favor of appellee, from which appellant has prosecuted this appeal.

The declaration alleges that on August 29, 1931, the defendants executed an appeal bond, by which they jointly and severally acknowledged themselves to be bound to the plaintiff (appellee here) in the sum of Two Hundred Fifty Dollars ($250.00). That the obligation was conditioned upon the McNair and Dudley Building Corporation paying appellee herein the amount of the judgment which might be rendered against it upon its appeal to the Circuit Court from a judgment recovered by appellee before a justice of the peace. The declaration then charged that at the January Term, 1932 of the said Circuit Court, the judgment recovered before the justice of the peace was affirmed in the sum of Two Hundred Sixty Dollars, together with costs. That the said corporation has not paid said judgment or any part thereof, whereby an action has accrued to the plaintiff to recover of the defendants the sum of $287.05.

Gen. No. 8392 Agenda No. 36

In the Appellate Court of Illinois

Second District

October Term, A.D. 1932.

M. D. Webb,

appellee,

vs.

B. A. Knight,

appellant,

Appeal from the County Court of Winnebago County

DOVE- 1:

This was an action of debt, instituted by appellee against appellant, B. A. Knight, and the McNair and Dudley Building Corporation, an Illinois corporation. A summons was issued against both defendants, but only appellant was served, and he challenged the sufficiency of the declaration by a general demurrer, which was overruled, and having elected to abide by his demurrer, a judgment was rendered in favor of appellee, from which appellant has prosecuted this appeal.

The declaration alleges that on August 29, 1931, the defendants executed an appeal bond, by which they jointly and severally acknowledged themselves to be bound to the plaintiff (appellee here) in the sum of Two Hundred Fifty Dollars ($250.00). That the obligation was conditioned upon the McNair and Dudley Building Corporation paying appellee herein the amount of the judgment which might be rendered against it upon its appeal to the Circuit Court from a judgment recovered by appellee before a justice of the peace. The declaration then charged that at the January Term, 1932 of the said Circuit Court, the judgment recovered before the justice of the peace was affirmed in the sum of Two Hundred Sixty Dollars, together with costs. That the said corporation has not paid said judgment or any part thereof, whereby an action has accrued to the plaintiff to recover of the defendants the sum of $287.05.

The only error assigned is the overruling of the general demurrer, and in his argument appellant insists that the failure of the sheriff to execute the summons as to the defendant McNair and Dudley Building Corporation, either by serving it or by returning it not found as to this defendant, renders the declaration vulnerable to his general demurrer. Appellant cites the case of Sherburne v. Hyde, 185 Ill. 580 as sustaining his contention. In that case it appeared that an attachment writ was issued against the Casey-Grimshaw Marble Company in which William Grace and Frank D. Hyde as partners were named as garnishees. The writ was served on Hyde and returned not found as to Grace. Hyde answered the garnishee interrogatories and the Supreme Court sustained a judgment rendered by the Superior Court against Hyde alone as garnishee. In the course of its opinion the court quotes Section 9 of the Practice Act, now Section 14, which provides: "If a summons or capias is served on one or more, but not on all the defendants, the plaintiff may proceed to trial and judgment against the defendant or defendants on whom the process is served, and the plaintiff may at any time afterwards, have a summons, in the nature of scire facias, against the defendant not served with the first process, to cause him to appear in said court, and show cause why he should not be made a party to such judgment * * *", and said: "It does not follow that because the plaintiff cannot elect to sue one only, of several partners, who are jointly liable, but must sue all, that judgment may not be rendered, as this section provides, against one, or more than one, who are served, and the prescribed steps then taken to bring in and make the remaining members of the firm parties to the judgment. A plaintiff cannot, in any case, bring his action against more than one and less than all of his joint debtors, but under this statute, he may sue all, whether partners or not, and take judgment against so many as are served or who appear, and the rest may be made parties to the judgment by summons in the nature of scire facias. But whether they are so made parties to the judgment or not, the judgment is valid because the statute authorizes it."

The only error assigned is the overruling of the general demurrer, and in his argument appellant insists that the failure of the sheriff to execute the summons as to the defendant Mohler and Dudley Building Corporation, either by serving it or by returning it not found as to this defendant, renders the declaration vulnerable to his general demurrer. Appellant cites the case of Herbrine v. Hyde, 188 Ill. 580 as sustaining his contention. In that case it appeared that an attachment writ was issued against the Casey-Grimshaw Metals Company in which William Grace and Frank D. Hyde as partners were named as garnishees. The writ was served on Hyde and returned not found as to Grace. Hyde answered the garnishee interrogatories and the Supreme Court sustained a judgment rendered by the Superior Court against Hyde alone as garnishee. In the course of its opinion the court quotes Section 9 of the Practice Act, now Section 14, which provides: "If a summons or capias is served on one or more, but not on all the defendants, the plaintiff may proceed to trial and judgment against the defendant or defendants on whom the process is served, and the plaintiff may at any time afterwards, have a summons, in the nature of scire facias, against the defendant not served with the first process, to cause him to appear in said court, and show cause why he should not be made a party to such judgment * * **", and said: "It does not follow that because the plaintiff cannot elect to sue one only, of several partners, who are jointly liable, but must sue all, that judgment may not be rendered, as this section provides, against one, or more than one, who are served, and the present as those taken to bring in and make the remaining members of the firm parties to the judgment. A plaintiff cannot, in any case, bring his action against more than one and lose than all of his joint debtors, but under this statute, he may sue all, whether partners or not, and take judgment against so many as are served or who appear, and the rest may be made parties to the judgment by summons in the nature of scire facias. But whether they are so made parties to the judgment or not, the judgment is valid because the statute authorizes it."

According to the allegations of the declaration in the instant case, this was a joint and several bond. The action was instituted against both the parties who executed the bond. Section 14 of the Practice Act expressly authorized the procedure followed and there is nothing said in the Sherburne case to sustain appellant's contention. We have examined Gottfreid Brewing Company v. McDonald, 146 Ill. App. 601 and other cases relied upon by appellant, but find they are not in point.

There was no error in overruling the general demurrer to the declaration and the judgment of the County Court is affirmed.

Judgment affirmed.

According to the allegations of the declaration in the instant case, this was a joint and several bond. The action was instituted against both the parties who executed the bond. Section 14 of the Practice Act expressly authorised the procedure followed and there is nothing said in the Sherburne case to sustain appellant's contention. We have examined Gottfried Brewing Company v. McDonald, 146 Ill. App. 601 and other cases relied upon by appellant, but find they are not in point.

There was no error in overruling the general demurrer to the declaration and the judgment of the County Court is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

8765

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAY 10 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8765 Ag. No. 30

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1934.

J. Victor Hulten and
Bettie Hulten,

Appellants,

vs.

Appeal from Circuit Court,
Winnebago County.

Margaret Nolan, et al.,

Appellees.

HUFFMAN-J.

The appellants herein, J. Victor Hulten and Bettie Hulten, his wife, were the owners of $1000 in notes, executed by Margaret Nolan and Thomas A. Nolan, her husband, and secured by trust deed upon a certain lot located in the city of Rockford. The mortgagors defaulted in the payment of interest and allowed the premises to be sold for general taxes for the year 1930, and paid no tax subsequent to that time. Appellants redeemed the property from the tax sale and were preparing to bring their bill of foreclosure. In order to save the trouble and expense of foreclosing the trust deed, appellants entered into an arrangement with the Nolans whereby appellants received a quit claim deed to the premises from the Nolans, under date of December 7, 1932, thereupon giving the Nolans a written agreement to reconvey the property to them at any time within one year upon payment of the mortgage indebtedness. The trust deed was released of record and it and the notes returned to the Nolans.

Appellee, the Rockford Finance & Thrift Company, held a judgment against the Nolans at the time the quit claim deed was delivered to appellants as aforesaid. A short time after

Gen. No. 8765 Ag. No. 30

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APPELLATE COURT OF ILLINOIS
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Bettie Hulten,

Appellants,

vs.

Appeal from Circuit Court,
Winnebago County.

Margaret Nolan, et al.,

Appellees.

HUTCHMAN-J.

The appellants herein, J. Victor Hulten and Bettie Hulten, his wife, were the owners of $1000 in notes, executed by Margaret Nolan and Thomas A. Nolan, her husband, and secured by trust deed upon a certain lot located in the city of Rockford. The mortgagors defaulted in the payment of interest and allowed the premises to be sold for general taxes for the year 1930, and paid no tax subsequent to that time. Appellants redeemed the property from the tax sale and were preparing to bring their bill of foreclosure. In order to save the trouble and expense of foreclosing the trust deed, appellants entered into an arrangement with the Nolans whereby appellants received a quit claim deed to the premises from the Nolans, under date of December 7, 1932, thereupon giving the Nolans a written agreement to reconvey the property to them at any time within one year upon payment of the mortgage indebtedness. The trust deed was released of record and it and the notes returned to the Nolans.

Appellee, the Rockford Finance & Thrift Company, held a judgment against the Nolans at the time the quit claim deed was delivered to appellants as aforesaid. A short time after

the release of the trust deed was made of record the Rockford Finance & Thrift Company, (which is the only appellee making an appearance herein,) served notice upon appellants that it held a judgment against the Nolans for the sum of $3532.28, and that it was about to levy upon the lot in question and to cause a sale thereof under execution to satisfy its judgment.

The appellants filed their bill in equity to enjoin the threatened levy and sale of the lot, claiming the same was not worth the amount secured by the trust deed, and praying that the quit claim deed and release of the trust deed might be set aside and the parties placed in status quo.

While other parties were made defendants to appellants' bill, yet none of them make any appearance upon this appeal except appellee, the Rockford Finance & Thrift Company. This defendant below insisted that appellants had lost all rights under and by virtue of the trust deed, which secured them in their debt, and that the lot was free to be taken by appellee upon its judgment. The trial court dismissed appellants' bill for want of equity and they prosecute this appeal from that decree.

In the case of Rogers v. Herron, 92 Ill. 583, the court on page 587 of its opinion, used the following language: "In Fitts v. Davis, 32 Ill. 391, where a mortgage had been executed on certain lands, and afterwards a judgment was obtained by a third person against the mortgagor, and after the rendition of the judgment the mortgagor conveyed to the mortgagee in satisfaction of the mortgaged debt, it was held that the mortgagee did not, by receiving a conveyance, thereby lose his lien, nor was it postponed to a junior incumbrance by judgment. The same rule was announced in Richardson v. Hockenhull, 85 Ill. 124, and the principle that governed those cases must control here."

the release of the trust deed was made of record the Rockford Finance & Thrift Company, (which is the only appellee making an appearance herein,) served notice upon appellants that it held a judgment against the Holms for the sum of $8382.28, and that it was about to levy upon the lot in question and to cause a sale thereof under execution to satisfy its judgment.

The appellants filed their bill in equity to enjoin the threatened levy and sale of the lot, claiming the same was not worth the amount secured by the trust deed, and praying that the quit claim deed and release of the trust deed might be set aside and the parties placed in status quo.

While other parties were made defendants to appellants' bill, yet none of them make any appearance upon this appeal except appellee, the Rockford Finance & Thrift Company. This defendant below insisted that appellants had lost all rights under and by virtue of the trust deed, which secured them in their debt, and that the lot was free to be taken by appellee upon its judgment. The trial court dismissed appellants' bill for want of equity and they prosecute this appeal from that decree.

In the case of Rogers v. Herron, 92 Ill. 383, the court on page 387 of its opinion, used the following language: "In Fitts v. Davis, 32 Ill. 391, where a mortgage had been executed on certain lands, and afterwards a judgment was obtained by a third person against the mortgagor, and after the rendition of the judgment the mortgagor conveyed to the mortgagee in satisfaction of the mortgaged debt, it was held that the mortgagee did not, by receiving a conveyance, thereby lose his lien, nor was it postponed to a junior incumbrance by judgment. The same rulewas announced in Richardson v. Hockenhull, 85 Ill. 124, and the principle that governed those cases must control here."

The intention of the parties is the controlling consideration where it has been made known or can be inferred from their acts and conduct. The court will look into all the circumstances of the case to ascertain the real intention of the parties. Where the mortgage is the eldest lien and is for an amount equal to or exceeding the value of the premises, and the mortgagee to avoid the expense of foreclosure, takes a conveyance from the mortgagor, a court of equity will not permit the mortgaged premises to be swept away from the mortgagee by a junior judgment creditor, without payment of the mortgage, under pretense that his lien has been lost by the taking of the deed. Richardson v. Hockenhull, 85 Ill. 124.

The Nolans held a bare equity of redemption, which they released by quit claim deed to appellants without any consideration therefor, except the discharge of the mortgage indebtedness. This was done to save the trouble and expense of foreclosing the mortgage. One evidence of this fact is that appellants by their written agreement made at the time, bound themselves to reconvey the property to the Nolans at any time within one year, upon payment of the mortgage indebtedness. This saved to the Nolans the same time as their statutory period of redemption. Under such circumstances, it is unreasonable to believe that it was the intent of appellants to give up their mortgage, which secured them in their debt, and leave the property free and clear to be taken on judgment of junior judgment creditors. Richardson v. Hockenhull, supra; Worcester Natl. Bank v. Cheeney, 87 Ill. 602, 615; Rogers v. Herron, supra; Lowman v. id., 118 Ill. 582, 587; Watson v. Gardner, 119 Ill. 312, 320; Moffett v. Farwell, 222 Ill. 543, 549.

Without further discussion, we consider the case of

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The Holsens held a bare equity of redemption, which they released by quit claim deed to appellants without any consideration therefor, except the discharge of the mortgage indebtedness. This was done to save the trouble and expense of foreclosing the mortgage. One evidence of this fact is that appellants by their written agreement made at the time, bound themselves to reconvey the property to the Holsens at any time within one year, upon payment of the mortgage indebtedness. This saved to the Holsens the same time as their statutory period of redemption. Under such circumstances, it is unreasonable to believe that it was the intent of appellants to give up their mortgage, which secured them in their debt, and leave the property free and clear to be taken on judgment of junior judgment creditors. Richardson v. Hoskenbull, supra; Worcester Nat. Bank v. Cheever, 97 Ill. 609, 613; Rogers v. Barron, supra; Lowman v. id., 118 Ill. 322, 327; Watson v. Gardner, 119 Ill. 312, 320; Moffett v. Farwell, 202 Ill. 542, 549.

Without further discussion, we consider the case of

Richardson v. Hockenhull, supra, and the other authorities above referred to, as decisive of the case at bar. We do not consider that appellee acquired any rights by the quit claim deed from Nolans to appellants, superior to those it had before such conveyance. Appellants had the right to invoke the aid of a court of equity against the attempt by appellee to take the property as sought herein.

The decree is reversed and the cause remanded with directions to permit appellants to amend their bill to foreclose their trust deed, if they are so advised, and to enjoin the sale of the property as sought by appellee, the Rockford Finance & Thrift Company; and in the event appellants do not elect to amend their bill to foreclose their trust deed, that a decree be entered in accordance with the prayer of the bill as filed, enjoining said appellee from the sale of these premises.

Reversed and remanded with directions.

Richardson v. Hockenhull, supra, and the other authorities above referred to, as decisive of the case at bar. We do not consider that appellee acquired any rights by the quit claim deed from Nolans to appellants, superior to those it had before such conveyance. Appellants had the right to invoke the aid of a court of equity against the attempt by appellee to take the property as sought herein.

The decree is reversed and the cause remanded with directions to permit appellants to amend their bill to foreclose their trust deed, if they are so advised, and to enjoin the sale of the property as sought by appellee, the Rockford Lumber & Thrift Company; and in the event appellants do not elect to amend their bill to foreclose their trust deed, that a decree be entered in accordance with the prayer of the bill as filed, enjoining said appellee from the sale of these premises.

Reversed and remanded with directions.

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) [illegible]7

8780

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAY 10 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GENERAL NO. 8780 AGENDA NO. 39

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1934

UNITED CAB & DRIVUR*
SELF, INC., a Corporation,
Appellant

vs.

ALICE WILEY,
Appellee.

APPEAL FROM
CIRCUIT COURT
WINNEBAGO COUNTY.

HUFFMAN-J.

On March 12, 1933, appellee while riding as a passenger for hire in one of appellant's taxicabs was injured by a collision of said cab with another automobile at the intersection of East State and Longwood Streets in the city of Rockford. Appellee sustained a fractured hip as well as other bruises, injuries and shock. Her son-in-law, Elmer M. Moore, who was also a passenger at the time and riding in the seat with appeallee, was thpown forward and his head forced through the glass panel, which constituted the partitinn between that part of the taxicab where the driver rode and that portion provided for the passengers.

Appellee at the time was seventy years of age. She was taken to the hospital and there remained until the 29th day of July 1933, when she was removed to her residence and there confined to her bed for a month, after which time she was able to get about with the aid of crutches. While in the hospital her condition became serious, she became unconscious, and a blood transfusion was resorted to as well as other concentrated forms of regenerative medicines. The evidence shows that she suffered greatly from shock and physical paiq. At

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1934

UNITED CAB & DRIVUR-SELF, INC., a Corporation,
Appellant

vs.

ALICE WILEY,
Appellee.

APPEAL FROM
CIRCUIT COURT
WINNEBAGO COUNTY.

HUFFMAN-1.

On March 12, 1933, appellee while riding as a passenger for hire in one of appellant's taxicabs was injured by a collision of said cab with another automobile at the intersection of East State and Longwood Streets in the city of Rockford. Appellee sustained a fractured hip as well as other bruises, injuries and shock. Her son-in-law, Elmer M. Moore, who was also a passenger at the time and riding in the seat with appellee, was thrown forward and his head forced through the glass panel, which constituted the partition between that part of the taxicab where the driver rode and that portion provided for the passengers.

Appellee at the time was seventy years of age. She was taken to the hospital and there remained until the 29th day of July 1933, when she was removed to her residence and there confined to her bed for a month, after which time she was able to get about with the aid of crutches. While in the hospital her condition became serious, she became unconscious, and a blood transfusion was resorted to as well as other concentrated forms of regenerative medicines. The evidence shows that she suffered greatly from shock and physical pain. At

the time of the trial in November 1933, it appears that she was unable to go up or down stairs without assistance. The evidence shows that she was permanently injured.

Appellee brought suit against appellant, in which she claimed damages to the extent of $40,000, including the sum of $2300 for hospital services, nursing, medicines, and money spent for medical aid and treatment. The evidence discloses that such expenditures total slightly less than $2200. The jury returned a verdict in favor of appellee for the sum of $7500, and judgment was entered thereon. Appellant prosecutes this appeal from the judgment of the circuit court.

After the close of appellee's case, and during the course of appellant's evidence, appellee was permitted to recall the witness Moore, for the purpose of proving that he was acquainted with appellant company and the business in which it was engaged. His evidence was to the effect that appellant was engaged in a general taxicab business. He stated he had ridden in appellant's taxicabs prior to the date of the accident, and that he knew the driver of the cab in question, and had seen him driving appellant's cabs a number of times. Appellant urges the trial court erred in permitting appellee to recall the witness and make such proof after a motion by appellant at the close of appellee's evidence for an instructed verdict had been denied. The declaration alleged that appellant was the owner of the taxicab in question, that it was then being operated by one of appellant's servants, and that appellee at the time and place of the accident was a passenger for hire riding therein.

The evidence of the witness Moore, upon his examination in the first instance, prior to his being recalled, discloses that he was at St. Anthony's Hospital visiting his wife, who was confined there following an operation; that appellee, his mother-in-law, was with him; that when they were ready to leave the hospital, he went to the office and

the time of the trial in November 1932, it appears that she was unable to go up or down stairs without assistance. The evidence shows that she was permanently injured.

Appellee brought suit against appellant, in which she claimed damages to the extent of $40,000, including the sum of $2500 for hospital services, nursing, medicines, and money spent for medical aid and treatment. The evidence discloses that such expenditures total slightly less than $2500. The jury returned a verdict in favor of appellee for the sum of $7500, and judgment was entered thereon. Appellant prosecutes this appeal from the judgment of the circuit court.

After the close of appellee's case, and during the course of appellant's evidence, appellee was permitted to recall the witness Moore, for the purpose of proving that he was acquainted with appellant company and the business in which it was engaged. His evidence was to the effect that appellant was engaged in a general taxicab business. He stated he had ridden in appellant's taxicabs prior to the date of the accident, and that he knew the driver of the cab in question, and had seen him driving appellant's cabs a number of times. Appellant urges the trial court erred in permitting appellee to recall the witness and make such proof after a motion by appellant at the close of appellee's evidence for an instructed verdict had been denied. The declaration alleged that appellant was the owner of the taxicab in question, that it was then being operated by one of appellant's servants, and that appellee at the time and place of the accident was a passenger for hire riding therein.

The evidence of the witness Moore, upon his examination in the first instance, prior to his being recalled, disclosed that he was at St. Anthony's Hospital visiting his wife, who was confined there following an operation; that appellee, his mother-in-law, was with him; that when they were ready to leave the hospital, he went to the office and

called appellant company for one of its taxicabs; that it was what is commonly designated as a Black & White cab; that when the cab arrived, he and appellee went out to the street and entered same, directing the driver thereof where they wished to go, and claimed that no other instructions were given the driver.

Appellant urges that it was an abuse of the court's discretion to permit appellee to recall the witness Moore. We do not so consider it. It has been held that after the close of evidence for both parties and argument commenced to the jury, that it is not error for the court to permit the case to be opened up and additional evidence introduced. Bolden v. People 184 Ill. 338, 341; Tucker v. People 122 Ill. 583, 593. Appellant cross examined the witness Moore on his subsequent testimony, and we do not consider the action of the trial court in permitting this witness to be recalled to be such an abuse of its discretionary powers as to constitute error herein.

Appellant urges lack of due care on the part of appellee. In this respect appellee states, "It was done so quick and all over before I knew what was the matter." The only other occupant of the taxicab than appellant's servant was Moore, and he states that, "As I was thrown forward, I saw a green Chevrolet in front of the cab***not more than 10 feet away." He further says that he had not seen the Chevrolet before that time, and that was the time of the happening of the accident, when this witness was being thrown through the glass partition. We do not consider appellent's contention in this respect of any merit. We do not understand that a passenger of a common carrier is obligated in the exercise of ordinary care, to anticipate negligence on the part of the carrier or its servants. Metz v. Yellow Cab Co. 248 Ill. App. 609.

called appellant company for one of its taxicabs; that it was what is commonly designated as a Black & White cab; that when the cab arrived, he and appellee went out to the street and entered same, directing the driver thereof where they wished to go, and claimed that no other instructions were given the driver.

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Appellant urges lack of due care on the part of appellee. In this respect appellee states, "It was done so quick and all over before I knew what was the matter." The only other occupant of the taxicab than appellant's servant was Moore, and he states that, "As I was thrown forward, I saw a green Chevrol t in front of the cab***not more than 10 feet away." He further says that he had not seen the Chevrolet before that time, and that was the time of the happening of the accident, when this witness was being thrown through the glass partition. We do not consider appellant's contention in this respect of any merit. We do not understand that a passenger of a common carrier is obliged in the exercise of ordinary care, to anticipate negligence on the part of the carrier or its servants. Metz v. Yellow Cab Co. 242 Ill. App. 209.

Appellant next insists the verdict is contrary to the weight of the evidence. This was purely a question of fact for the jury. Mr. Koch, manager of appellant company, and a witness for appellant, testified that he was in the taxicab business and a drivurself business; that the name of the company was United Cab & Drivurself Company; that appellant operated taxicabs in the city of Rockford and the majority of its business was done in response to telephone calls. It furthersappears from his evidence that appellant carried passengers for hire, and on March 12, 1933, that appellant was engaged in such business; that its taxicab involved in this accident was then engaged in transporting people for hire, and Elmer Hodapp, the driver of the taxicab, was at that time employed by appellant as driver of said taxicab. The testimony of various witnesses who saw the collision between appellant's cab and the other automobile, was offered in evidence, going to show the manner in which the collision occurred. It is the province of the jury to determine the credibility of the witnesses and the weight to be given to their testimony; and unless the verdict is contrary to the evidence, a court of review will not substitute its judgment for that of the jury and reverse a case merely because the evidence is conflicting. People v. Coniglio 353 Ill. 643. Where the evidence is conflicting, and that of appellee when considered alone, fairly authorizes the verdict, the same will not be disturbed upon review, unless errors of law intervene. Dick v. Zimmerman 105 Ill. App. 615; Blackhurst v. James 304 Ill. 586.

Appellant next contends that the verdict is excessive. The evidence shows that prior to the accident, appellee had enjoyed good health, that she worked and walked like any average person, that she helped with the duties of housekeeping; and that since the accident, she has not been

Appellant next insists the verdict is contrary to the weight of the evidence. This was purely a question of fact for the jury. Mr. Koon, manager of appellant company, and a witness for appellant, testified that he was in the taxicab business and a drivurself business; that the name of the company was United Cab & Drivurself Company; that appellant operated taxicabs in the city of Rockford and the majority of its business was done in response to telephone calls. It furthermorappears from his evidence that appellant carried passengers for hire, and on March 12, 1933, that appellant was engaged in such business; that its taxicab involved in this accident was then engaged in transporting people for hire, and Elmer Hodapp, the driver of the taxicab, was at that time employed by appellant as driver of said taxicab. The testimony of various witnesses who saw the collision between appellant's cab and the other automobile, was offered in evidence, going to show the manner in which the collision occurred. It is the province of the jury to determine the credibility of the witnesses and the weight to be given to their testimony; and unless the verdict is contrary to the evidence, a court of review will not substitute its judgment for that of the jury and reverse a case merely because the evidence is conflicting. People v. Coniglio 353 Ill. 642. Where the evidence is conflicting, and but of appellee when considered alone, fairly authorizes the verdict, the same will not be disturbed upon review, unless errors of law intervene. Dick v. Zimmerman 105 Ill. App. 615; Blackburnt v. James 304 Ill. 556.

Appellant next contends that the verdict is excessive. The evidence shows that prior to the accident, appellee had enjoyed good health, that she worked and walked like any average person, that she helped with the duties of housekeeping; and that since the accident, she has not been

able to get around without crutches and has not been free from pain. We have examined the record carefully, and we do not find anything to indicate that the verdict of the jury was the result of passion or prejudice and appellant refers us to no such place in the record. We do not consider the damages so grossly excessive as to be self-evident that the jury was actuated by improper motives. Under such circumstances, this court is unable to say that the amount of the verdict is so excessive as to demand a reversal.

Appellee submitted 3 instructions which were given by the court. Appellant objects to the giving of these instructions. Appellant had 13 instructions given and an equal number refused. Appellant objects because of its refused instructions. We have examined all of the above instructions and from our examination thereof, we are of the opinion that appellee's instructions fairly and properly set forth the law, and no error resulted from the giving thereof. On behalf of the appellant, we are of the opinion that the jury was fairly instructed by its given instructions, and that no error was committed in refusing such as were denied by the court. It should not be necessary to burden a trial court with 26 instructions in a case of this nature. In our opinion, appellants 13 given instructions fairly instructed the jury.

Finding no reversible error in the record, the judgment of the circuit court of Winnebago county is affirmed.

Judgment affirmed.

able to get around without crutches and has not been free from pain. We have examined the record carefully, and we do not find anything to indicate that the verdict of the jury was the result of passion or prejudice and appellant refers us to no such place in the record. We do not consider the damages so grossly excessive as to be self-evident that the jury was actuated by improper motives. Under such circumstances, this court is unable to say that the amount of the verdict is so excessive as to demand a reversal.

Appellee submitted 3 instructions which were given by the court. Appellant objects to the giving of these instructions. Appellant had 13 instructions given and an equal number refused. Appellant objects because of its refused instructions. We have examined all of the above instructions and from our examination thereof, we are of the opinion that appellee's instructions fairly and properly set forth the law, and no error resulted from the giving thereof. On behalf of the appellant, we are of the opinion that the jury was fairly instructed by its given instructions, and that no error was committed in refusing such as were denied by the court. It should not be necessary to burden a trial court with 26 instructions in a case of this nature. In our opinion, appellants 13 given instructions fairly instructed the jury.

Finding no reversible error in the record, the judgment of the circuit court of Winnebago county is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) [illegible]7

8742

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. BLAINE HUFFMAN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

275 I.A. 643

BE IT REMEMBERED, that afterwards, to-wit: On JUN 15 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8742 Agenda No. 17

In the Appellate Court of Illinois

Second District

February Term, A. D. 1934

Ruth Eisenstein, et al (James Berry, Receiver, and Swedish American National Bank of Rockford, as Trustee),

Appellants,

vs.

Otto J. Erwin, et al,

Appellees.

Appeal from the Circuit Court of Winnebago County.

DOVE-J.

Otto J. Erwin and wife, Hattie H. Erwin, executed eleven notes payable to the order of themselves and endorsed and delivered them to Blackhawk First Mortgage Company, as trustee. The notes aggregating $12,000.00 were numbered 294 to 304 inclusive and were made payable at the office of the Blackhawk First Mortgage Company. Note #294 was paid in full. Ruth Eisenstein became the owner of note #295. Minnie Peters became the owner of note #296. Herman Wallin became the owner of note #297 and the Swedish American National Bank, as trustee, became the owner of the remaining notes numbered 298 to 304 inclusive. To secure the payment of these notes with coupons attached the Erwins conveyed certain real estate in the City of Rockford to Blackhawk First Mortgage Company, as trustee, and on November 3, 1931, default having been made in the terms and conditions of the trust deed, Ruth Eisenstein, Blackhawk First Mortgage Company, trustee, Minnie Peters, Herman Wallin and Swedish American National Bank, as trustee, filed their bill to foreclose the trust deed.

Subsequently and on November 21, 1931, James Berry was appointed receiver, and thereafter duly qualified. The cause proceeded to a decree and the premises having been sold by the Master for $758.81 less than the debt, interest and costs, a deficiency decree was

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Subsequently and on November 21, 1931, James Berry was appointed receiver, and thereafter duly qualified. The cause proceeded to a decree and the premises having been sold by the Master for $7,738.81 less than the debt, interest and costs, a deficiency decree was

rendered on December 29, 1932 in favor of Swedish American National Bank, trustee, and against Otto J. Erwin and Hattie H. Erwin for said sum, with interest from September 20, 1932, the date of the sale.

On April 4th, 1933 the receiver filed his verified report which was subsequently amended. This report showed a balance in his hands of $211.47 and asked, among other things, that he be allowed credit for a payment of $558.81, made on February 24, 1933 to the Swedish American National Bank, his report reciting that this sum was the balance due on its deficiency judgment in addition to $200.00 paid by Otto J. Erwin thereon. To this report David Lundberg, a defendant, to whom the Erwins had conveyed the mortgaged premises after the execution of the trust deed, filed exceptions. A hearing was had and an order entered sustaining the exceptions of Lundberg to the payment, by the receiver, to the Swedish American National Bank, trustee, of $558.81, and directing the bank to repay that amount to the receiver and ordering the receiver to then pay Lundberg the entire balance in his hands, amounting to $770.28. From this order the bank and the receiver have perfected this appeal.

Upon the hearing of the exceptions to the receiver's report, it appeared that about the middle of February 1933 David Solomonson, an attorney who then represented the Erwins, but who now appears for appellee, David Lundberg, called the attorney for appellants and stated that he represented Otto Erwin, against whom there was a deficiency judgment, and upon which an execution had been issued but no levy made; that he then said if a levy was made, Erwin being about broke would have to go through bankruptcy, and asked what it would take to procure a release of the judgment against Otto Erwin in order to obviate bankruptcy. The attorney for appellants requested a financial statement of Mr. and Mrs. Erwin, which was submitted and Solomonson offered to pay $100.00. Thereupon, the attorney took the matter up with the bank and told

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Mr. Solomonson that with what there was on hand in the hands of the receiver, that if Erwin would pay $200.00, a release of any deficiency coming from him would be given. After some further talk, Solomonson said Erwin had some stock of the Central Public Service Corporation and if that would be taken at $25.00, it would save Erwin having to raise so much cash and that was done. The attorney for appellants, Mr. Reno, testified to the foregoing and concluded: "I computed at that time the amount of money that was on hand in the Receivership and ascertained if he would pay $200.00 there would be enough on hand to pay off the balance of the deficiency judgment and leave about $200.00, which with the rents to be received during the rest of the receivership would be sufficient to pay the taxes and assessments. I accepted the $175.00 in cash and the stock from Solomonson with what there was on hand to complete the rest of the deficiency judgment against Otto J. Erwin and Hattie H. Erwin his wife".

In our opinion the evidence does not justify the order sustaining the exception to the item of $558.81. There is no dispute as to the facts. None of the foregoing testimony is denied. The proposition made by appellees' attorney was that Otto J. Erwin would pay $175.00 in cash and give stock of the agreed value of $25.00 to be released from his personal liability - so that he would not be forced into bankruptcy by a levy under the deficiency judgment and when the proposition was accepted by the attorney representing appellants, he, the solicitor then representing Mr. Erwin and now representing Mr. Lundberg, was informed that he would take the rents then on hand in the hands of the receiver and with the $175.00 cash and stock he would then release the deficiency judgment, as the amount then in the hands of the receiver and what would be collected would be sufficient to clear up everything.

It also appears that, on the same day Erwin made his payment, the balance due the bank was paid by taking $558.81 of the funds to the credit of the receiver in the Blackhawk First Mortgage Company

Mr. Solomonson that with what there was on hand in the hands of the receiver, that if Erwin would pay $800.00, a release of any deficiency coming from him would be given. After some further talk, Solomonson said Erwin had some stock of the Central Public Service Corporation and if that would be taken at $25.00, it would save Erwin having to raise so much cash and that was done. The attorney for appellants, Mr. Reno, testified to the foregoing and concluded: "I computed at that time the amount of money that was on hand in the Receivership and ascertained if he would pay $800.00 there would be enough on hand to pay off the balance of the deficiency judgment and leave about $200.00, which with the rents to be received during the rest of the receivership would be sufficient to pay the taxes and assessments. I accepted the $175.00 in cash and the stock from Solomonson with what there was on hand to complete the rest of the deficiency judgment against Otto J. Erwin and Hattie M. Erwin his wife".

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It also appears that, on the same day Erwin made his payment, the balance due the bank was paid by taking $588.81 of the funds to the credit of the receiver in the Blackhawk First Mortgage Company

and placing that sum to the credit of the Swedish American National Bank on the books of the Blackhawk First Mortgage Company, and the sheriff was directed to return as satisfied the execution issued on the deficiency judgment. This, of course, released Mr. and Mrs. Erwin of their personal liability to the Bank, which was the sole purpose of his attorney, as evidenced by his original proposition. The question then arises; Was the transaction between Solomonson and Reno a sstisfaction of the rights of the Swedish American National Bank in the rents, as evidenced by the deficiency decree and the order appointing the receiver, or was it only a release of the personal liability of Otto J. Erwin and wife?

It seems to us the answer must be that the transaction was intended to accomplish nothing more than a release of the personal liability of the Erwins.

The cases cited by the appellees, viz: Neal v. Handley, 116 Ill. 418; Winter v. Meier, 151 Ill. App. 572, and Curtiss v. Martin, 20 Ill. 557 and many other cases along the same line that might be cited would be in point if the bank was seeking to further rely upon and enforce the personal liability of the Erwins. But the bank is doing no such thing. It is now simply endeavoring to preserve its rights in the fund and that only to the extent of its adjudged claim against the pledged property. The first obligation of the receiver was to pay the deficiency judgment at the earliest opportunity in order to forestall the accumulation of interest. Powell v. Voight, 348 Ill. 605 (610), and if on February 24, 1933, the receiver had applied to the court for an order to apply this amount of $558.81, which he then had on hand on the deficiency judgment, and if no objection had been interposed by the Erwins, undoubtedly such an order would have been entered; simply because the order was not procured in advance would not warrant the court in withholding approval of his act in making the payment where the evidence shows the receiver was justified in so doing. After the

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bank had received this $558.81 from the receiver on February 24, 1933, and after it had received the $175.00 and stock from Erwin, it caused, on February 25, 1933, the execution to be returned satisfied. To say that the $175.00 cash payment and the stock was accepted by Mr. Reno, acting for the bank, in full satisfaction of the deficiency decree is to entirely disregard the undisputed evidence in this record.

The courts have repeatedly held, and it is a maxim of our jurisprudence that equity regards substance rather than form and equity will always look through all devices in order to understand the real situation and will grant relief against a threatened wrong. Dunbar v. Amer. Tel. Co. 224 Ill. 9; McReynolds v. Stoats, 288 Ill. 22; Comstock etc. v. Baldwin, 169 Ill. 636. When the order complained of was entered, the whole case was still in the control of the Chancellor and if the Erwins were complaining the court would have adjusted all the equities in accordance with the rights of the several parties, and an order would have been justified approving the action of the receiver in making the payment he did to the bank, directing him to refund the cash payment of $175.00 to Mr. Erwin and return to him his certificate of stock, and ordering the receiver to pay the bank the further sum of $200.00 and pay the remaining $11.47 in his hands to Lundberg. The Erwins, however, are apparently satisfied and are asserting no claim to any portion of the fund in the hands of the receiver and for that reason Lundberg, being the owner of the equity of redemption, is entitled to have the balance paid to him.

The order appealed from is reversed and this cause is remanded to the Circuit Court with directions to the Circuit Court to overrule the exceptions of Lundberg to the report of the receiver as to payment of the item of $558.81, and direct the receiver to pay to

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The order appealed from is reversed and this cause is remanded to the Circuit Court with directions to the Circuit Court to overrule the exceptions of Lundberg to the report of the receiver as to payment of the item of $558.81, and direct the receiver to pay to

David Lundberg the balance in his hands of $211.47, and upon complying therewith, that the report of the receiver be approved and he discharged.

Reversed and Remanded with Directions

David Lundberg the balance in his hands of $321.47, and upon complying therewith, that the report of the receiver be approved and he discharged.

Reversed and Remanded with Directions

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

PUBLISHED IN ABSTRACT

The Wichita Flour Mills Co., a Corporation trading under the name, style and description of The Willis Norton Company, Plaintiff in Error, v. Oscar Shawver, Defendant in Error.

Writ of Error to the Circuit Court of Clark County.

APRIL TERM, A. D. 1934

Gen. No. 8824 **Agenda No. 6**

MR. JUSTICE DAVIS, delivered the opinion of the Court.

Plaintiff in error, The Wichita Flour Mills Co., a corporation trading under the name and style of The Willis Norton Company, hereinafter referred to as plaintiff, brought suit against Oscar Shawver, defendant in error, hereinafter referred to as defendant, in the circuit court of Clark County, to recover damages in the sum of one thousand dollars for a breach of an alleged contract entered into by said parties, and a trial thereof resulted in a judgment in favor of the defendant.

Plaintiff has sued out of this court a writ of error for a review of the record.

Plaintiff is engaged in the business of milling and sale of flour and other products of its mills. The defendant resides at Martinsville, Illinois, and is engaged in the feed, flour, coal and ice business and has been for a period of seven or eight years.

In August, 1929, M. B. Fultz, a traveling salesman for plaintiff, had a telephone conversation with the defendant in regard to the sale of flour, and after such conversation he sent the following telegram to his employer:

"Willis Norton Company, Topeka, Kansas.

Shawver, Martinsville, offers $6.20 for 250 barrel one-half cotton, White Loaf to January, Fingenbaum to get 20 cts. Will be Mattoon, Thursday, care Fingenbaum. Signed M. B. Fultz."

Upon receipt thereof plaintiff sent a telegram to defendant confirming said supposed purchase of flour and at the same time wrote a letter as follows:

August 29, 1929. "Although the market is higher this morning, we are enclosing copy of message sent you confirming sale to you through Mr. Fultz of 250 bbls. I. O. White Loaf $6.20 cotton halves. Shipment to January. Thanking you for the business, we are

Yours truly,
The Willis Norton Company,
By E. B. Sewell."

On September 12, 1929, the plaintiff received the following telegram:

September 12, 1929. "Willis Norton Company, Topeka, Kansas.

Ship one hundred barrels White Loaf twenty-four paper contract, one fifty bran and fifty gray shorts. Signed Oscar Shawver."

On September 13, 1929, plaintiff sent the following letter to the defendant:

"We are enclosing contract covering sale of 250 barrel Inter Ocean White Loaf $6.20 in cotton halves for shipment to January. Please sign and return the white copy of this contract. We are also inclosing shipping directions covering this car, and we certainly appreciate this business.

Yours truly,
The Willis Norton Company,
By B. A. Meade."

The white copy of the contract mentioned in this letter was received by plaintiff and was signed, "Oscar Shawver."

On September 12, 1929, the date upon which defendant ordered shipped the 100 barrels of flour and the bran and shorts, there still remained to be delivered to him, upon a prior contract, fifty barrels of flour which was sold under a contract dated November 14, 1928.

On September 14, 1929, the 100 barrels of flour and the bran and shorts were shipped and an invoice of the shipment mailed to the defendant and a bill of lading with a draft attached was mailed to the bank at Martinsville, Illinois. Upon the arrival of said shipment the defendant paid said draft and received the merchandise. The invoice that was mailed to the defendant clearly stated that 50 barrels of the flour was balance due on booking of November 14, 1928, and 50 barrels of the flour applied on booking of August 29, 1929.

Plaintiff received no more orders for shipment of flour under the last contract, which provided for shipment to January, 1930, and before the expiration of the contract wrote the defendant numerous letters and sent a great many telegrams requesting directions for shipment of the balance of the 250 barrels of flour but never received a reply to any of the letters or telegrams. The originals of a great number of the letters and telegrams that were sent by the plaintiff were produced upon the trial from the files of the defendant.

After the contract was terminated said suit was instituted in the circuit court to recover damages for a breach of the contract, and the defense interposed by the defendant was that he did not sign the contract nor authorize any one else to place his name thereon.

He testified that he spent about one-third of his time in the office, and that during his absence his wife and clerks attended to the business for him, although he further testified that he never authorized any of them to purchase goods for him. He denied also that he ordered any flour. He does not make the claim that his name signed to the contract was a forgery, but simply says that he did not sign it himself nor authorize any one to sign his name.

The invoice clearly shows that fifty barrels of the flour shipped to him was flour furnished under the last contract, and his acceptance of the flour and payment of the draft accompanying the bill of lading for this flour are evidence of his ratification of the contract. His testimony in avoidance of this presumption of ratification is, that he thought that there were a hundred barrels of flour still due under the previous contract and that he did not read the invoice and paid it without any knowledge of its contents. It seems hardly possible that any business man would pay a draft for goods in the amount of $949.75 and not examine the invoice to see that the quantities and prices were in accordance with his contract, and little credence can be given to his testimony in that regard. He testified that he never answered any of the letters or telegrams, sent him by plaintiff, for the reason he had never signed the contract. He never informed plaintiff that the signature to the contract was not his, nor authorized by him, but remained absolutely silent.

Plaintiff's Exhibit 7, the contract to which the name of Oscar Shawver was signed, was a form of contract known as Miller's National Federation Uniform Sales Contract, Adopted June 3, 1929, and contained a provision that the buyer should furnish shipping instructions at least fourteen days before the time of shipment.

And further provided that if the buyer should fail to furnish shipping instructions as provided in said contract that the seller might terminate the contract, the buyer to pay to the seller as liquidated damages on wheat flour remaining unshipped, by reason of buyer's breach or default, the sum of:

(a) One-third of one cent per day per barrel on flour, from the date of sale to the date of the termination as expense of carrying; plus (b) Twenty cents per barrel as the cost of selling; and (c) plus or minus the difference between the market value of a bushel of cash wheat at mill on the date of sale and on the date of termination, multiplied by 4.6 times the number of barrels of flour. This amount to be added if the price of cash wheat is lower, and subtracted if the price of cash wheat is higher, upon the date of termination.

This contract fixed the amount of liquidated damages to which the plaintiff was entitled in the event of a termination of the contract on account of the failure of the buyer to furnish shipping instructions. The evidence shows that the price of flour depends upon the market price of wheat, and under the terms of the contract plaintiff was compelled at all times to be in a position to make shipment as ordered regardless of what the price of wheat might be when such shipments were made.

Plaintiff further insists that even though defendant did not sign the contract or authorize any one to sign for him yet he remained silent until after the suit was commenced, when he had knowledge that plaintiff claimed he had executed the contract and permitted plaintiff to expend the money necessary to purchase the wheat, which the evidence shows was worth $1.25 per bushel, required to mill the flour contracted to be delivered and to pay storage and insurance thereon and keep the same on hand to fill said contract, and that defendant is now estopped from denying the fact of the execution of the contract because at the date of its termination wheat was only 67 cents per bushel and plaintiff sustained a loss on account of the silence of defendant.

It was the duty of the defendant, as soon as he became acquainted with the fact, if it is a fact, that his name on the written contract was a forgery, to notify the plaintiff of that fact, and if by his silence plaintiff suffered an injury it is entitled to the damages occasioned thereby and defendant would be estopped from denying the fact of his execution of the contract.

The contention of plaintiff is not sustained by the evidence, the record fails to disclose any purchase of wheat or any payment of storage charges or insurance on account of this contract. This question of estoppel by silence was recently before this court in the case of *National Trust Bank* v. *Seaman,* 270 Ill. App. 422, and a number of authorities were there cited upon this question.

We are of opinion that the judgment in this case is contrary to the manifest weight of the evidence and it is, therefore, reversed and remanded.

Reversed and remanded.

(Six pages in original opinion)

PUBLISHED IN ABSTRACT

E. J. Fleischli, Appellee, v. Railway Express Agency, Appellant.

Appeal from Circuit Court of Sangamon County.

APRIL TERM, A. D. 1934

Gen. No. 8827 **Agenda No. 9**

MR. JUSTICE DAVIS delivered the opinion of the Court.

This case was originally tried before a justice of the peace, and upon appeal to the circuit court of Sangamon county a trial of said cause resulted in a verdict for appellee in the sum of $138.96, from which judgment this appeal was perfected.

Appellee was the owner of several St. Bernard dogs, and for several years had shipped one or more of them to various places for the purpose of exhibiting them at dog shows. He desired to enter one of his dogs at a show to be held at Madison, New Jersey, May 27, 1933, and some two weeks before that date his brother called upon the agent of the Railway Express Agency, the appellant, at Springfield, Ill., and inquired about train schedules. The agent promised to inquire about schedules and advise him, and, on May 15th, he sent him a letter, showing two different routes, one leaving over the Wabash Railway and the other over the Chicago & Alton Railway.

This letter, so far as it relates to the schedule of trains over the Wabash Railway, is as follows:

May 15th, 1933.

"Mr. Jos. H. Fleischli,
1041 No. 3rd St.,
Springfield, Illinois.
Dear Sir:

We are in receipt of the following schedule relative to the shipment of dogs:

Leave Springfield..	Wab. #2	7:25 P. M.	Mon.
Arrive Toledo		8:00 A. M.	Tue.
Leave Toledo . ..	NFC #32	8:45 A. M.	Tue.
Arrive Buffalo		4:38 P. M.	Tue.
Leave Buffalo...	DL&W #10	6:15 P. M.	Tue.
Arrive Hoboken		5:10 A. M.	Wed.
Leave Hoboken..	DL&W #609	7:15 A. M.	Wed.
Arrive Madison		8:05 A. M.	Wed.

The schedule can be adapted to suit the dog movement so as to have him reach Madison Saturday morning.

Yours very truly,
General Agent."

On May 25th the plaintiff brought his dog to the office of defendant at the Wabash Railway depot at 6:40 p. m. for shipment on a train scheduled to leave at 7:25 p. m. This train was scheduled to connect at Decatur with another train going east on the main line of the Wabash Railway.

The agent of defendant testified that when the plaintiff brought the dog to the station to be shipped, he advised him that the train from the west, due at Springfield at 7:25 p. m., was delayed by floods and high water and would not make the connection at Decatur. Plaintiff admits that the agent told him that the train was late, but denies that he told him that the reason therefor was because of floods or high water. Plaintiff further testified that he asked the agent if the dog would get to New Jersey on time, and that he replied that it would because they would hold the train in Decatur due to the fact that the train, coming from the west, carried a good amount of express that that train carries for the east. The agent denies that he made these statements to appellee, but testified that he told him no connection could be made at Decatur. The evidence shows that the cause of this train being too late to connect with the eastbound train at Decatur was extremely high water at Valley City, and between Valley City and Bluffs, and between Bluffs, Neelyville and Chapin.

Appellee tried the case on the theory of a breach of contract by appellant, as shown by the instructions tendered by and given on his behalf by the court, as follows: "The court instructs the jury that the plaintiff is seeking to recover damages for alleged sums of money paid out, and obligations alleged by him to have been incurred on account of the alleged failure of the defendant to transport a certain dog in accordance with the terms of a certain transportation contract;" and also "that the plaintiff charges that the defendant entered into a contract with the plaintiff to transport a certain dog for the plaintiff to a certain place of destination by a certain time, and that the defendant failed to transport said dog within the time agreed upon, and that on account thereof the plaintiff sustained damages."

This was an interstate shipment, and the agent of appellant had no authority to make any agreement, oral or otherwise, in violation of the rules adopted and approved by the Interstate Commerce Commission.

Appellant introduced in evidence the freight classification rules and rate schedules of the Railway Express Agency, which were certified to by the secretary of the Interstate Commerce Commission, and filed and approved by the Commission.

Rule 7, Paragraph A, on page 18, reads as follows: "Agreements as to time of delivery of express matter

must not be made unless provision for such agreement is contained in lawfully published tariffs."

It has been held that Congress, by the enactment of the Carmack Amendment to the Interstate Commerce Act, took possession of the subject of liability of a carrier under contracts for interstate shipments, and that Act supersedes all state regulations in reference to that subject. Clingan v. C. C. C. & St. L. Ry. Co., 184 Ill. App. 202. In the case of M. K. & T. R. Co. v. Ward, 244 U. S. 383, the court held: "The parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act. * * * A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the act aimed." See also Adams Express Co. v. Croninger, 226 U. S. 491; Georgia F. & A. R. Co. v. Blish Milling Co., 241 U. S. 10.

In the case of Dean v. Belt Ry. Co., 210 Ill. App. 220, it was held: "But, as we there said, even if the facts justify holding the company negligent by reason of delay, still, it being an interstate shipment, the rule of liability laid down in the federal courts must govern, for since the passage of the Carmack Amendment to the Interstate Commerce Act, 'the special regulations and policies of particular states upon the subject of a carrier's liability for loss or damage to interstate shipments, and the contracts of carriers with respect thereto, have been superseded.' (Charleston & W. C. Ry. Co. v. Varnville Furniture Co., 237 U. S. 597; Adams Exp. Co. v. Croninger, 226 U. S. 491; Gamble-Robinson Commission Co. v. Union Pac. R. Co., 262 Ill. 400; Peoria & P. U. Ry. Co. v. Corning & Co., 266 Ill. 515.)"

Appellee now contends that appellant was guilty of negligence in not transporting the dog to its destination within a reasonable time and, therefore, is liable for the damages sustained by appellee.

Appellee waited until the last possible opportunity for shipping the dog so that it would arrive on the morning of the show, if all train connections were made. On account of high water and floods the connection between the train from the west and the eastbound train at Decatur was not made, and the dog did not arrive at the destination in time to be entered in the show, but arrived in the evening of that day, and we find that this was not due to any negligence on the part of appellant.

Neither under the law nor the facts has appellee any cause of action, and the judgment of the circuit court is reversed.

Reversed.

(Four pages in original opinion)

(29070—7-34) 14

PUBLISHED IN ABSTRACT

Crawford B. Murton, Appellant, v. Ernest Humphrey and L. N. Rolle, doing business under the firm name and style of Springfield Fruit Supply Company, Appellees.

Appeal from the Circuit Court of Sangamon County.

APRIL TERM, A. D. 1934. 275 I.A. 643

Gen. No. 8831 **Agenda No. 12**

MR. JUSTICE DAVIS delivered the opinion of the Court.

Crawford B. Murton sued appellees in the circuit court of Sangamon county to recover damages claimed to have been sustained by him as a result of a collision between an automobile owned by him and in which he was riding, and a truck owned by appellees, caused, as claimed by him, through the negligence of the servants of appellees who were in charge of said truck, and upon a trial of said cause a judgment was rendered in favor of appellees, from which judgment appellant has appealed.

The declaration consists of two counts, in the first of which it is alleged that on October 24, 1931, at 6:00 a. m., appellant was riding in a motor vehicle, owned by him and being driven along a highway known as Sauk Trail Highway, which extended in an easterly and westerly direction, and that appellees through their servants were operating a Dodge truck along a hard surfaced highway, near the City of Chicago Heights, which extended in a northerly and southerly direction and which intersected with said Sauk Trail Highway and there ended; that while in the exercise of due care by himself and the driver of his car, appellees through their servants then and there improperly, carelessly and negligently drove said truck, and by and through their negligence said truck ran and struck with great force and violence against the side of appellant's automobile, and by reason thereof appellant was injured.

The second count is similar to the first, except that it is alleged that through the negligence of the servants of appellees said truck was turned to the east on to Sauk Trail Highway and struck with great force and violence against the left side of the automobile belonging to appellant and in which he was riding, and by reason thereof he was injured. A plea of general issue was filed to said declaration.

The only point insisted upon for reversal of the judgment is that the court committed prejudicial error in the giving of two instructions on behalf of the appellees.

The evidence on behalf of appellant discloses that on October 24, 1931, he, in company with Mr. Leggett, Mr. Palmquist and Mr. Pierson, was traveling west on Sauk Trail Highway near the village of Richton; that appellant and Mr. Leggett were sitting in the rear seat, and Mr. Pierson was driving appellant's Packard automobile, and seated in the front seat with him was Mr. Palmquist. Appellant testified that he disliked to drive on long journeys and that Mr. Pierson frequently drove the automobile for him.

Sauk Trail Highway is an asphalt two-lane highway which intersects with a four-lane hard-surfaced highway, known as Governor's Highway, which runs in a northerly and southerly direction and ends at said intersection. As the car neared said intersection it was traveling at a speed of fifteen to twenty miles per hour on the right hand side of said highway and was slowing up as they intended to turn south on Governor's Highway. At this point a truck was seen, coming from the south on Governor's Highway. Pierson drove straight ahead and gave room for the truck, but the truck instead of being in the first lane of traffic was in the second lane, and apparently the driver could not turn quickly enough and the truck collided with the car, the left front wheel of the truck striking the running board of appellant's car near the rear door. Pierson asked the driver of the truck, "What in the world were you doing?" He said, "I don't know." There were no signs on Sauk Trail Highway, but there is a danger sign on Governor's Highway, a large sign, and then at the end there are bomb lights burning and a cross bar. At the time of the impact the truck was in the lane of travel of the Packard car. The front part of the truck was up against the Packard car, and the rear of the truck was in the second lane and the front over on the right lane of the highway the car was on.

Harry W. Bruns also testified on behalf of appellant, and from his testimony it appears that he was Chief of Police of Richton Park, and that he heard a crash and looked and could see two headlights, and got into his car and drove down to the place of the accident. He testified he saw a truck had run into a Packard at the junction of Governor's Highway and Sauk Trail. The truck was turned a little to the northeast and the Packard was facing southwest. He asked the driver of the truck how it happened and he said, "I don't know." He said, "I was sleeping." He said, "I woke up too late." I asked him how it happened, and he said he woke up just as he saw the car; he had been driving all night and was pretty tired, and

he had dozed off two or three times from Kankakee and found himself off of the road. I asked the man who was riding with him if he knew anything about it, and he said: No, he didn't wake up until it was all over. When I got there the truck was in the middle of Sauk Trail, just across the center, I would say five or six feet.

Two witnesses testified on behalf of appellees, the truck driver, Clyde Gamble, and Herman Chandler who was riding with the driver. It appears from their testimony that they left Springfield about 8:00 o'clock in the evening of October 23, 1931, and were going to Benton Harbor, Michigan, and arrived at the intersection of Governor's Highway and Sauk Trail Highway around 6:00 o'clock in the morning. As they neared the Sauk Trail route they saw a car, coming from the right on the Sauk Trail, about a block and a half from the junction where the two routes meet. The driver started to slow down and get ready to make the turn and got the wheel of the car at about a half angle and the car came along and side-swiped the truck in front.

The truck at that time being in the second lane from the right, and was not at the intersection yet; the other car made a left hand turn and hit the truck. At the time of the collision the truck was stopped. The driver testified that he did not make any statement to appellant, or anybody else, that he couldn't help it or that he was asleep. Herman Chandler, who was riding with the driver of the truck, also testified that he did not make a statement to anybody that he did not see the car coming because he was asleep.

This, in substance, is the testimony as disclosed by the record in this case. It is unnecessary for the court to comment upon the weight of the evidence or to determine in whose favor it preponderates. From an examination of the evidence it is apparent it is very close and conflicting and, therefore, the instruction of the court must be accurate in order that the jury may arrive at a correct conclusion or the judgment will be reversed and the cause remanded for another trial under proper instructions.

While the first instruction to which our attention is called is somewhat awkwardly drawn, we do not think that it is sufficiently erroneous to warrant a reversal of the judgment.

The second instruction which is claimed to be erroneously given is, as follows:

> "The Court instructs the Jury that the Plaintiff in this case was a passenger in his own motor vehicle and that whilst a passenger in an automobile is not required to assume control of the vehicle, he

cannot wholly escape the duty of keeping a lookout and warning the driver of apparent danger. He is bound to use the same care for his own safety as a reasonably prudent person would use under similar circumstances and if the Jury believe that if the Plaintiff's failure to exercise such care contributed to his injury in this case, he cannot recover even though you may believe that the negligence of the Defendant's agent may have been the proximate cause of the accident."

This instruction assumes that the plaintiff failed to exercise due care for his own safety, and for that reason is erroneous. Woods v. C. B. & Q. R. R. Co., 306 Ill. 217; People v. Harvey, 286 Ill. 593.

The question of due care upon the part of the plaintiff was one of the material issues to be determined by the jury from the evidence, and no assumption that he did not exercise such care should have been made in the instruction. It is also erroneous in that it permits the jurors to base their verdict upon their "belief," regardless of the evidence. The rule in this state has always been that the jury must base its findings upon the evidence. Miller v. Balthasser, 78 Ill. 302; R. I. & P. Ry. Co. v. Leisy Brewing Co., 174 Ill. 547; Village of Altamont v. Carter, 196 Ill. 286.

This instruction alludes to the plaintiff as a passenger in the car when in fact he was the owner of the car which was being driven by his agent and was responsible for his driver's negligence, if any, and is therefore erroneous in attempting to instruct the jury as to the law in relation to a passenger riding in a car.

Because of the error indicated in the giving of the second instruction on behalf of appellees, the judgment is reversed and cause remanded.

Reversed and remanded.

(Five pages in original opinion)

(29070—6-34) 14

PUBLISHED IN ABSTRACT

Glenn O. Rau, Appellee, v. Farmers Grain Company, at Chestnut, Illinois, Appellant.

Appeal from the Circuit Court of Logan County.

APRIL TERM, A. D. 1934.

Gen. No. 8835 **Agenda No. 15**

MR. JUSTICE DAVIS delivered the opinion of the Court.

Appellee recovered a judgment against appellant for the sum of $1,000.00 in an action of Trespass on the Case in the Circuit Court of Logan County.

The declaration consists of two original and one amended counts. The first count alleged that on August 15th, 1932, the defendant was operating an elevator at Chestnut, Illinois, and plaintiff was engaged in hauling and delivering grain thereto; that it was the duty of defendant to use reasonable care in unloading trucks used by parties and failed to do so, in that it failed to block or check trucks used in delivering grain; that while exercising due caution his said truck, on account of not being properly blocked by defendant and on account of the condition of the runway of said elevator, ran against the side of the runway of said elevator and by reason thereof the plaintiff was thrown out and broke his right leg.

The second count alleged that defendant carelessly and negligently failed to use due care and diligence to provide, make and maintain said elevator dump and ramp and the descent to said dump in a reasonably safe condition in that said ramp had such an incline and steep descent, that, by the momentum and weight of the vehicles descending said ramp, said vehicles necessarily descended with great force and speed and it was difficult to control the descent of the same; that plaintiff was delivering grain to said defendant and while in the exercise of due caution drove said truck from the dump in the elevator down said descent, and by reason of defendant's negligence the truck ran against the side of said driveway of said ramp and struck the side railing and by reason thereof he was thrown out and upon the ground or the floor of said elevator, dump and ramp and his right leg was broken.

In the additional count it was alleged that it was the duty of the defendant to keep its elevator in a reasonably safe condition; that defendant disregarded its duty and had an elevator that had hazards and

dangers, in that at the west end was a steep descent, and that where a wagon was placed at a point to unload the front wheels were much lower than the rear wheels and that it was inclined to run down the runway; that there were barriers to prevent trucks or wagons from running off of said runway; that said barriers were old, rotten and decayed and not of sufficient strength to prevent trucks from going through the same; that while plaintiff was delivering grain his truck started down the runway and ran against and through the barricade on the left side, and while endeavoring to stop the descent of his truck it broke said barricade, and the plaintiff was thrown against said barricade and upon the ground.

Counsel for appellee in their briefs and arguments say: "Two elements of negligence were alleged and proven:

(1) That it was the duty of appellant to block the truck at the point where he directed it should stop or warn appellee, who was not familiar with the practice of this elevator, to block it.

(2) That old, dilapidated banisters and posts were maintained at this elevator by appellant with full knowledge that if trucks came in contact therewith, the banister would not stop the truck and thereby the truck would break through the same. These two issues the jury's verdict established as proven.

The controlling and material facts in this case are simple. The plaintiff drove to the elevator to deliver a load of corn which was in a truck of one and one-half tons capacity, which he had owned and used for over two years prior to the date of the accident. This truck weighed 4,000 pounds, and the net weight of the corn was 4,350 pounds, or 1,350 pounds in excess of the truck's rated capacity. The dump is about seven feet above the surface of the ground and is reached by two driveways, one from either end. Appellee ascended the east driveway. In the floor there were a number of holes into which the grain was dumped. When his truck reached the proper place to dump the grain an employee of appellant told him to stop his truck, which he did.

Appellee testified, in substance, that I stopped so the dump hole was about a foot behind the rear end of the truck; I took off the end gate and climbed on top of my load and he handed me a scoop and told me to go to it; I stopped then and put on my emergency brake, threw into the bin five or six scoops of grain before the truck started moving; I saw no piece of wood there, or anything else, that I could put in front of my wheel; I said nothing about it; the front wheel sat on a good incline from where the rear wheel sat,

the decline from the rear wheels to the front wheels was approximately eight inches; Mr. Trapp and I took measurements there about that roadway or elevator two weeks ago; we used a steel tape; the runway was nineteen feet long from where my front wheels sat to where the dirt road begins; it was about ten feet from the bottom of my truck to where the ground was; the roadway is about seventy-five feet long; there is about three feet, seven inches, fall in the nineteen feet of driveway. I just started to scoop out corn and the truck started down the driveway after I scooped five or six scoops of corn down; it started west, and I stepped on the running board to get hold of the steering wheel but it ran through the banister and threw me out. It was nine or ten feet from where I was standing to the running board, I got on the left running board, truck gathered speed very fast after it started; drive had sharp turn in it and truck hit the banister at the beginning of turn and went on through; I guess it was the frame went down, and it kind of tipped up and I guess that is what threw me off on the north side of the approach to the ground. It was about twelve feet down to where it threw me; did not see two large blocks there along side of the driveway, no blocks there that I saw. I did not make any effort to look for them. There was nothing about my brakes that day that prevented them being effective in holding my car; when I stopped I left my car out of gear.

The proof shows that appellee had frequently delivered corn at the elevator some four years previous to the accident, and about four months before he had driven up into the elevator and got a load of grain. The proof conclusively shows that the truck did not run off of the west ramp and fall to the ground, but struck the banister and a post on the south side of the ramp and was stopped. It appears from the evidence that the banisters on the sides of the ramp were not defective, but were merely black and weather-beaten. So far as it appears from the evidence the truck was not injured to any great extent. There were two or more large wooden blocks near this hole on the dump where he stopped his car, kept there for the purpose of blocking wheels of wagons and trucks.

Appellee knew that his truck was built for a capacity load of a ton and one-half, and knew the weight of his load. He was charged with the knowledge, common to everybody, that a truck parked on an incline will roll to the bottom of such incline unless prevented by brakes or other means. He knew that the front wheels of his truck were on an incline, and that the

combined weight of the truck and the load exceeded 8,000 pounds, and if, as he testified, he had set his emergency brakes and pulled them back as far as he could, then his brakes were either defective or were incapable of resisting the pressure of the overload of corn.

There was no legal duty on the part of appellant to put the block under the wheel on his truck, the blocks were there to be used by drivers of trucks unloading grain, if they saw fit to use them, and they could have been used by plaintiff, if he so desired, and thus have prevented the accident.

The uncontradicted evidence is that appellee stopped his truck, which was overloaded, with the front wheels on the incline of the ramp leading from the elevator to the ground, and started to shovel corn out of the truck, and the truck rolled down the incline until it struck the side of the ramp and a post, where it stopped, and that appellee either jumped from the truck or was thrown off by the impact ofthe same with the post.

In our opinion appellant was not guilty of any negligence which was the proximate cause of the injury. The judgment of the Circuit Court is reversed.

Reversed.

(Five pages in original opinion)

PUBLISHED IN ABSTRACT

Polly Ottwell, by W. R. Donoho, her Conservator, Appellee, v. National Fire Insurance Company of Hartford, Connecticut, Appellant.

Appeal from Circuit Court, Pike County.

APRIL TERM, A. D. 1934

Gen. No. 8830 **Agenda No. 11**

MR. JUSTICE FULTON delivered the opinion of the Court.

This is an action on a fire insurance policy for loss occasioned by the destruction by fire of a dwelling house and household goods. The amended declaration avers the issuance of the policy to the appellee, Polly Ottwell and Thomas Ottwell, her husband; that later the policy was altered so that it insured Polly Ottwell and the estate of Thomas Ottwell; and that later it was again altered making Polly Ottwell the sole beneficiary. The policy is then set forth in haec verba and shows that the policy was issued by Appellant and insured the interest of Thomas Ottwell and Polly Ottwell in the amount of $1,600.00 to expire January 2, 1935. The declaration also shows that later on this amount of insurance was reduced to $1,100.00, on the dwelling house and $200.00 on the household goods. The policy contained the usual provisions included for the benefit of the insurer, among which was one providing for the avoiding of the insurance in case the title of the insured is other than sole and unconditional ownership. It further provided that the policy could be avoided if proofs of loss were not furnished the company within sixty days.

The declaration charged a waiver of the provision for proof of loss on the part of the Appellant. The Appellant filed the general issue and three special pleas. The second plea set forth that the Appellee was not the sole and unconditional owner of the property destroyed by fire. The third plea averred that the Appellee intentionally set fire to the dwelling house insured by the policy and caused the same to be destroyed by fire. The fourth plea averred that Appellee was suing for more money than was permitted by the terms of the policy. Issues were joined and the case proceeded to trial before a Court and Jury.

There was no controversy about the execution of the policy nor as to the loss by fire. The Appellee testified that she was sleeping in the home on the night the fire occurred; that the next morning she called up

a representative of Appellant and notified him of the loss; that a week or so later the representative came to her home with an insurance adjuster and looked over the ruins from the fire. The adjuster told her they would turn it over to the fire marshal, and after that she did nothing.

A witness Joel Jones, testified to the value of the burned dwelling house. Several witnesses testified on behalf of Appellant about suspicious circumstances in support of the plea that Appellee intentionally started the fire herself.

The defendant's proof further showed that the title to the real estate upon which the dwelling house was located was deeded to Thomas Ottwell and Polly Ottwell, who was his wife, as tenants in common in 1902. The policy was taken out on January 2, 1930. Thomas Ottwell died in July, 1930, leaving Polly Ottwell as his widow and one daughter, Zula, as his heir at law. On September 2, 1930, the policy was changed to insure Polly Ottwell and the estate of Thomas Ottwell. On September 29, 1930, the policy was changed to insure her alone. At the close of Appellee's evidence and again at the close of all the evidence, Appellant moved for an instructed verdict, both of which motions were denied. The jury returned a verdict for $856.25 and judgment was entered thereon.

Reversal of this judgment is sought by Appellant upon three principal grounds. First, that it was incumbent upon Appellee to show that proofs of loss were expressly waived or that Appellant adopted such a course of conduct as might lead the assured to believe a strict compliance with the condition would not be demanded. In this case the representative of the Appellant and the insurance adjuster told the Appellee they would turn the matter over to the State fire marshall, which indicated they would refer the matter to the State fire marshall and report to her later. We believe this remark tended to lull Appellee into believing the company would not require formal proofs of loss.

The rule is well settled that an insurance company may, through its agent waive proof of loss without the use of express words. This may be done by his acts and conduct inconsistent with an intention to enforce strict compliance with the conditions of the policy, which conduct is calculated to lead the insured to believe that the company did not intend to require the compliance. Fray v. National Fire Insurance Co., 341 Ill. 431. Eberhart v. Aetna Ins. Co., 217 App. 354.

It is next insisted by Appellant that the testimony of Jones, on the value of the property was improperly admitted. Jones had a general knowledge of the prop-

erty from having passed by along the road frequently before the fire, and also had twenty-five years experience as a carpenter and builder. After the fire he was called to the ruins and measured the foundation. Appellee informed him as to the size of the rooms, their location, the kind of material in the building and the general state of repair. Based on this knowledge and over the objection of Appellant he was permitted to express an opinion as to the value of the building. In a similar situation in the case of C. & A. R. R. Co. v. Glenny, 175 Ill. 238, the Court said:

"Another witness testified as to the depreciation in the value of buildings, generally, by age, and was then permitted to give his opinion as to the value of those destroyed, based upon the description of them given by the witness Glenny, who was acquainted with them, the witness giving the opinion never himself having seen them. The form in which the question was put to the witness as an expert was not strictly proper. * * * It has been permitted in some courts to pursue the course taken in this case, but as we said in Pyle v. Pyle, 158 Ill. 289, 'the better and proper practice, however, is to put a question to the witness reciting the supposed facts hypothetically upon which the opinion of the expert is wanted.' The error in this case was one of form rather than of substance." So in this case we believe the opinion of the witness should have been based upon a hypothetical statement of what had been already proven in the case as well as upon his own actual observation, but that it was not reversible error under the circumstances of this case to prove the value as above outlined.

It is also urged by Appellant that the verdict of the jury was against the manifest weight of the evidence, relying chiefly upon the failure of the Appellee to prove that she was the sole and unconditional owner. At the time the policy was originally issued there is no controversy but that the Appellee and her husband were the sole and unconditional owners. After the husband's death two riders were placed on the policy changing the beneficiary. It is admitted that Appellee was living in the dwelling house as a homestead at the time of the fire; that she owned an undivided one-half interest in the real estate and a possible undivided one-third part of her deceased husband's half interest. It is our judgment that Appellee's interest was a legal interest, which was insurable and that she had a right to sue on the policy and collect the proceeds of it although a small portion of such proceeds might be impressed with a trust. Budelman v. American Ins. Co.,

297 Ill. 222. Fray v. National Fire Ins. Co., 341 Ill. 431. It was further contended by Appellant that the verdict of the jury is also opposed to the manifest weight of the evidence on the question of whether Appellee burned the property. On this question the Appellants testimony tends to throw some suspicion upon the acts of Appellee but all the material charges are either explained or denied by Appellee so that there was a direct conflict in the evidence and it became a question for the jury to decide. We do not think there is any reason to disturb the finding of the jury on this question of fact.

Finding no reversible error in the record, the judgment of the Circuit Court is therefore affirmed.

Affirmed.

(Five pages in original opinion)

PUBLISHED IN ABSTRACT

John E. Sharp, Appellee, v. Frank U. Patterson, Appellant.

Appeal from the Circuit Court of Sangamon County.

OCTOBER TERM, A. D. 1933.

Gen. No. 8797 **Agenda No. 13**

PER CURIAM:

In this case an appeal is prosecuted from a verdict and judgment in favor of the plaintiff, John F. Sharp, for $389.15. The suit was brought in the Circuit Court of Sangamon County by the plaintiff against the defendant, Frank U. Patterson, to recover the sum of $1,426.74 which amount the plaintiff claimed was due him as a balance for wages earned while in the employ of the defendant.

Plaintiff filed a declaration consisting of five special counts and the common counts; and filed with his declaration an affidavit of claim together with an itemized account which shows the amount above stated as due and payable.

To this declaration, and each count thereof, the defendant filed certain pleas; also his affidavit of merits; and with his affidavit of merits also filed an itemized account, which shows that he owes the plaintiff the sum of $269.57. Thereafter these pleas were withdrawn by leave of court and the defendant, by leave of court, filed an additional plea. This additional plea is a plea of non assumpsit to each of the counts of the declaration and as to all of plaintiff's claim, except the sum of $269.57. As to this balance of $269.57, the defendant filed a plea of tender, and with his plea paid this sum into court, together with $11.40 costs which were due at the time of the filing of the plea.

Afterwards, also by leave of court, the defendant filed a plea of estoppel after the plaintiff had accepted the tender and received the same from the clerk upon the order of the court.

Concerning this feature of the case the defendant states, in his brief, that the plaintiff "accepted the tender as a part payment of his claim; and the money was paid to him by the clerk upon an order of court, specifying that the payment was made as a part payment upon the amount claimed by the plaintiff, reserving for future determination and adjudication the matter of the balance of plaintiff's demand claimed in his affidavit of claim."

Thereafter, on motion of the defendant, plaintiff filed a second itemized account. And the defendant, with

reference to this second itemized account, makes the following statement in his brief:

> "This itemized account showed, that the defendant owed to the plaintiff a balance of $884.77, after acceptance of the tender. There was one item of credit which the defendant claimed in his itemized statement that was not admitted in plaintiff's second itemized statement; and which was not contained therein. This was the Coleman item of $394.58. This credit was afterwards, before trial, admitted by the plaintiff to be correct. After admitting this item of credit there was left a balance claimed by the plaintiff of $489.19." (Afterwards this was changed to $488.88)."

The issue on the trial was whether or not this sum of $488.88, or any part thereof, was due from the defendant to the plaintiff. The defendant made a motion for a new trial and to set aside the verdict which the jury had rendered; and upon his motion assigned the following reasons:

1. The court admitted on the trial improper evidence on the part of the plaintiff.
2. The court refused to admit proper evidence offered by the defendant.
3. The court improperly gave to the jury the instructions numbered 8, 12, 17, 19, 20, 18, 21 and 16.
4. The court improperly modified the second instruction offered by the defendant.
5. The verdict of the jury is not supported by the evidence.
6. The verdict is contrary to the law and the evidence.

The court overruled the motion for a new trial, however, and rendered judgment as hereinbefore stated.

The same reasons which the defendant assigned, in his motion for a new trial to set aside the verdict of the jury, are also assigned as reasons for reversal of the judgment.

A consideration of the record clearly discloses that there is nothing involved in this case or presented for review in this court except the question of fact, namely, that the verdict is contrary to the evidence. We find no reversible error in any of the instructions which were given to the jury by the court. Upon consideration of the evidence we reach the conclusion that the jury were fully warranted from the evidence in finding the amount due the plaintiff which they returned in their verdict, and assessed as plaintiff's damages.

Finding no reversible error in the record the judgment of the circuit court is affirmed.

Judgment affirmed.

(Three pages in original opinion)

STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

February Term, 1934.

Agenda 11.

275 I.A. 644[3]

E.B.Ring, Receiver, etc. Plaintiff in Error. vs. Charles E.Palmer, Conservator, etc., Defendant in Error.	Error to Circuit Court of Richland County.

EDWARDS, P.J.

This is a writ of error, sued out to review an order of the Circuit Court of Richland County, allowing a claim of defendant in error as a preference, in the administration of the affairs of the Bank of Noble, an insolvent institution.

Plaintiff in Error has fully met all the legal requirements in the prosecution of such writ of error. Defendant in error has filed no brief as required by rule of this Court; therefore the judgment is reversed and the cause is remanded, under authority of the decision of this court in Eichelberger v. Robinson et al., 233 Ill. App. 579.

Reversed and remanded.

Not to be reported in full.

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STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

February Term, 1934
Agenda 25.

275 I.A. 644

Wilhelmina Spaet, Plaintiff in Error, vs City of Alton, Illinois, Defendant in Error.	Error to Circuit Court of Madison County.

EDWARDS, P.J.

Plaintiff in error, who will be designated as plaintiff, brought suit in the Circuit Court of Madison County, against defendant in error, to be hereafter referred to as defendant, to recover for injuries claimed to have been sustained by her through slipping on a sidewalk of defendant, due to the accumulation thereon of grease and oil. The accident was alleged to have occurred on March 1, 1932; the general issue was pleaded, and afterwards, on February 23, 1933, leave was given plaintiff to amend the declaration by averring the giving of the statutory notice of the happening, to the municipal authorities; amendment was filed March 1, 1933, and the following day the cause was called for trial; whereupon, defendant moved to strike the amendment for the reason that its effect was to cause the declaration to state a new cause of action, and was barred by the statute of limitations.

The Court sustained the motion and struck the amendment; plaintiff thereupon moved for a continuance on the ground of surprise; this motion was overruled, and the cause ordered to trial; plaintiff then took no further part in the proceeding, and a jury which had been sworn to try the issues, was directed by the court

to return a verdict for defendant. Plaintiff moved for a new trial, which was overruled; judgment was entered upon the verdict for defendant, and against plaintiff for costs; to reverse which this writ of error has been sued out.

Defendant moves the court to strike the bill of exceptions, and to affirm the judgment, for the reason that it does not appear from the abstract that the bill of exceptions was ever filed in the office of the clerk of the circuit court.

We have carefully examined both the abstract and the original record, and do not find from either that the bill of exceptions was in fact filed. A bill of exceptions does not become a part of the record unless it is filed with the clerk of the court in which the cause was heard, even though it has been signed and sealed by the trial judge. Hall v. The Royal Neighbors of America, 231 Ill., 185. Williams v. DeRoo, 316 Ill., 23.

In Zbinden vs. De Moulin, 243 Ill. App. 509, this court had before it a similar question, and after a review and discussion of authorities, held that the signing of a bill of exceptions by the trial judge did not make it a part of the record; that before it became such, it was requisite that it be filed with the clerk of the court in which the cause was heard.

In order that a bill of exceptions be properly incorporated in a record on appeal, it must affirmatively appear, by the record proper, that such bill was filed in the office of the clerk of the trial court, in apt time, and such fact cannot be established by mere recitals in the bill of exceptions itself, because the bill is no part of the record until it is properly signed and filed. 4 Corpus Juris, 302. Howe v. White, 69 N.E.R., 684 (Ind.) It follows that for the failure of the record to disclose that the bill of exceptions was filed, as required by law, the same is no part of the record of the cause, and should be stricken; which will accordingly be done.

The assignments of error do not reach the common law record,

and are such that they can only be shown by a bill of exceptions. The latter having been stricken, there is nothing before this court for its consideration; hence the judgment should be affirmed. People v. Lucor, 317 Ill., 423.

Judgment affirmed.

not to be published in full

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

FEBRUARY TERM, A. D. 1934.

Term No. 1 | Agenda No. 9

275 I.A. 645

ELISABETH RUBIN,
Appellant,

vs.

AUGUST GRAUMENZ, Executor of the Last Will and Testament of Henry Knecht, Sr.,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF FAYETTE COUNTY.

Murphy, J:

The appellant, Elisabeth Rubin, filed her claim in the county court of Fayette County against the estate of Henry Knecht, Sr. The claim was based upon a promissory note payable to appellant, dated March 25, 1926, for $575., due one day after date for value received. Outside of the body of the instrument and to one side of the signature appeared the following notation, "This note will be due after my dead". The claim was disallowed by the county court and on appeal, the cause was tried in the circuit court without a jury, resulting in a judgment for appellee. The present appeal followed and appellant seeks a reversal on the grounds that the court erred in finding from the evidence that there was no proof of delivery of the note and in entering judgment for appellee.

The claim originated in the county court, while sitting in probate. No pleas were filed by appellee. The parties tried the case in the circuit court on the theory that verified pleas, denying delivery or execution were not necessary to raise those questions, therefore we will treat it in the same

way here and assume that appellee's objections to the introduction of the note in evidence on the grounds that there had been no proof of delivery, raises the same question as though non-delivery had been pleaded.

When the case was called for trial, appellant called the executor of the estate as a witness and proved by him the date of the death of said decedent, that the signature to the note was in deceased's hand writing; that the note was not among the papers of the deceased after his death and that it had not been paid. Appellant then offered the note in evidence and appellee objected and assigned as reason that there is no proof it was ever delivered; merely proof of the execution of the note. The court ruled that the note be admitted subject to the objection.

In Bippus v. Vail, 230 Ill. App. 635, 638, the court said, "Delivery is an essential part of the execution of a note. Delivery will be presumed, where the note is no longer in the possession of the party whose name appears on it, unless it is expressly denied by verified plea and when it is, the plaintiff will be put to the burden of proving delivery as a part of his prima facie case".

In Halladay v. Blair, 223 Ill. App. 609, a claim had been filed against the estate of a deceased person based upon several promissory notes. The representative of the estate filed an affidavit denying the execution and delivery of the notes. On passing upon an instruction that told the jury mere possession of the notes was prima facie evidence that the claimant was the owner and that the same were unpaid, the appellate court held that the filing of the affidavit denying execution and delivery made Section 16, Chapter 98, Cahill's Statutes (Negot. Inst. Act)

inapplicable, destroyed the presumption of delivery arising from the fact of possession and cast upon the claimant the burden of proving delivery as in a contested case at common law.

Appellee's objection, that there was no proof of delivery of the note, being treated as having the same effect as though non-delivery was pleaded or denied by affidavit, cast upon the plaintiff the burden of proving delivery of the note. As the record then stood, there was no error in sustaining the objection to the introduction of the note.

To meet the objection of appellee and the ruling of the court thereon, the appellant introduced the testimony of William Jasper. He testified that he knew deceased and saw him sign the note and that after deceased signed it, he gave the note to the witness with directions to keep it until after the death of Knecht and then to deliver it to appellant and that he kept the note until after Knecht's death and then delivered it to appellant. On cross-examination, this witness testified that he was called to appellant's residence where deceased was making his home and that Knecht told him to write, "I want Mrs. Rubin to have $575. after my death" which he did and that deceased then signed it; that the witness a few days later was told that a note would be better than the signed statement and that he had the note in question prepared and called on deceased and told him what he had learned about the former transaction and that deceased then signed the note and the original signed statement was destroyed.

At the conclusion of the evidence of this witness, the court, without objection or motion by appellee, announced that the court found something upon the note he did not know was on there, without stating what he had found, that the note was withdrawn from evidence and that plaintiff could make further proof.

We do not know what the court found on the note that prompted the ruling withdrawing the note from evidence. The note is in the usual form of a promissory note with warrant of attorney to confess judgment attached. The only unusual thing on the note was the notation on the margin that it was not due until the death of the maker. The notation was in direct conflict with the date of maturity expressed in the body of the note and without evidence to prove a different intention would not be treated as part of the note, Becker v. Hofsommer, 186 Ill. App. 553, but considered in connection with the evidence of the witness Jasper, we are of the opinion that the deceased intended the note should not be due until death, at any rate his directions as to delivery gave it that effect.

It is the settled law of this State that a note payable after death of the maker is a promise to pay at a time certain, Neish v. Gannon, 198 Ill. 219; Shaw v. Camp, 160 Ill. 425; Campbell,et al v. Thompson, 192 Ill. App. 415, and that delivery of such a note to a third person to be delivered to the payee after the death of the maker is a valid delivery. The court erred in withdrawing the note from the evidence.

Appellant offered the testimony of two other witnesses, the substance of which was that they had had conversations with the deceased in which he spoke of his appreciation of the care and attention that appellant was giving him and said he was getting cheap board and that he had things fixed so that claimant would get her part and that he had fixed a paper to be delivered to her at his death.

At the conclusion of appellant's evidence,the note was again offered in evidence. The record does not disclose any objection by appellee but the court ruled that he would consider the same after the cause is submitted for final determination.

Appellee offered no proof on the question of delivery of the note, his evidence being limited to the introduction of

the will and another claim of appellant which she had filed against the estate for board and care of deceased and board for the nurse, all of which accrued long after the date of the note.

The only grounds of objection urged by appellee in the trial court to the admission of the note in evidence was that there was no proof of delivery. For the reasons pointed out the note should have been admitted in evidence.

The record does not disclose that the court ruled on the admissibility of the note and on account of that condition of the record, we cannot determine whether the court entered the judgment in bar of the action on the grounds that there was no proof of delivery or whether he considered the note as in evidence and that it was without consideration.

It becomes material since appellee's sole contention in this court is that the note was without consideration being an attempted gift in violation of the Statute of Wills and therefore void. Appellant's reply to that is that appellee did not raise that question in the lower court and cannot raise it for the first time on appeal. The record supports appellant's contention and therefore the only point relied upon by appellee in this court to sustain the judgment cannot be considered. Murphy v. Smith, 112 Ill. App. 404; Logan v. Mutual Life Ins. Co., 293 Ill. 510.

The note on its face purported to be for value received and had it been admitted in evidence, it would have made a prima facie case for appellant and cast upon appellee the burden of proving no consideration.

For the reasons assigned, the judgment of the lower court is reversed and the cause remanded.

Reversed and Remanded.

Not to be published in full.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

FEBRUARY TERM, A. D. 1934.

Term No. 7 | Agenda No. 15

275 I.A. 645

ROAD DISTRICT NO. THREE,
Appellant,

vs.

JOHN UFFELMANN,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF RANDOLPH COUNTY, ILLINOIS.

Murphy, J:

This suit originated in justice court and was appealed to the circuit court. On September 27, 1933, the case was tried in the circuit court with a jury. At the close of all the evidence on motion of plaintiff, appellant here, the court directed a verdict for the plaintiff for $500. Appellee made a motion for a new trial and asked the court to grant time within which to prepare and file a written motion. At the same time appellant moved for a judgment on the verdict, which was overruled. Appellee was given time to prepare his written motion for new trial but the order did not specify any time within which it should be filed.

The record shows that following September 27, the court was in session October 5th and on that date adjourned to November 20th and then adjourned to November 22nd.

The motion for new trial was on file on the latter date and the same was overruled. Judgment was entered on the verdict and appellee here prayed an appeal to this court which was granted. Appellant then moved for judgment nunc pro tunc

as of September 27th which motion was overruled. Appellant prayed and perfected its appeal from the order denying its motion for a judgment nunc pro tunc. Appellee did not perfect his appeal.

The question raised on this record is, did the court commit error in overruling appellant's motion for a judgment nunc pro tunc as of September 27th.

A party in a law case against whom a verdict has been rendered has the right to his motion for a new trial and to the judgment of the trial court upon all the questions that may properly be raised by such motion. Cockrum v. Keller, 258 Ill. 276. The time within which a written motion for new trial shall be filed is within the discretion of the trial court and in this case that discretion has not been abused.

Appellant had no right to a judgment on the verdict during the pendency of the motion for a new trial. It did have the right to ask the court on September 27th and the subsequent sessions on October 5th and November 20th to fix a time limit for the filing of the motion for a new trial.

Since the judgment on the verdict could not have been entered during the pendency of the motion for a new trial, it follows that after the motion for a new trial was overruled on November 22nd, it was not within the power of the court to then enter a judgment nunc pro tunc as of September 27th.

"The office of an order nunc pro tunc is only to supply some omission in the record of an order that was really made but omitted from the record. If an order is actually made by the Court but there is failure to enter, the Court may correct the mistake in failing to enter the order made and make the record show that the order by the Court was actually made as of the date it was made. No Court has the

right to create an order by that method or to supply an order which was never in fact made. A nunc pro tunc order cannot be made to supply an omission to make an order, but only an omission in the record of the order". People v. Rosenwald, 266 Ill. 548. Lindauer v. Pease, 192 Ill. 456.

For the reasons assigned, the judgment of the circuit court is affirmed.

Affirmed.

Not to be published in full.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

FEBRUARY TERM, A. D. 1934

Term No. 26 | Agenda No. 24

ABNER CAREY,
Appellant,

vs.

ALTAMONT MANUFACTURING COMPANY,
Appellee.

275 I.A. 645

APPEAL FROM THE CIRCUIT COURT OF EFFINGHAM COUNTY.

Murphy, J:

By this appeal appellant, hereinafter referred to as plaintiff, seeks to reverse a judgment entered by the circuit court of Effingham County, in a suit plaintiff instituted against appellee, hereinafter referred to as defendant.

On June 18, 1929, plaintiff, defendant and the Indiana Board and Filler Company entered into a contract whereby plaintiff sold defendant and the Indiana Company, jointly, the entire output of egg cases to be manufactured by plaintiff in one year, beginning July 1, 1929, to be not less than forty nor more than sixty car loads, twenty cars to be furnished by January 1, 1930. Cases made entirely from cottonwood and shipped before January 1, 1930 were sold at fifteen cents. F. O. B. plaintiff's factory with 2% discount if paid within ten days or thirty days net. Prices for cases shipped after January 1st were to be fifteen and one-half cents per case with no distinction as to price by reason of kind of wood they were made from. All cases were to be of standard quality as to material and workmanship. Defendant and the Indiana

Company loaned plaintiff $5000, evidenced by note due on or before January 1, 1930, with interest at seven percent per annum, with certain securities as collateral. It was agreed that $250 should be deducted from the sale price of each car and applied on the note. September 6, 1929, a supplemental agreement was signed by all the parties releasing the collateral given by plaintiff under the first contract to secure said note. Its further terms are not material in this case. The same date, another contract was entered into, by which the defendant and the Indiana Company, parties of the first part, agreed to furnish $5000 for the purpose of stocking plaintiff's mills at Grayville with logs at a costs of $7.50 per cord for cotton wood and $6. for maple and other woods. The logs were to be piled in plaintiff's yards or within trucking distance therefrom. The contract contained this provision, "Said logs are to be and remain the property of the first parties herein jointly until finally disposed of". Plaintiff was to buy the logs from the producers and all logs so purchased were to be inspected and paid for by the companies. Plaintiff agreed to buy from defendant and the Indiana Company all logs so purchased and to pay $7.50 per cord for cottonwood and $6. for maple and other woods. Plaintiff was to provide storage space for the logs and care for them against flood. Plaintiff also agreed to buy other logs from his own funds and pile them separate.

In January, 1930, heavy floods along the Wabash River mixed the logs bought under this later agreement, with plaintiff's own logs, and many (of both parties) were lost. In May, 1930, the plaintiff and representatives of both companies met at Flora and effected a settlement on the logs and, following this meeting, plaintiff wrote defendant and the other company each a letter setting forth his version of the agreement. The evidence shows that each company accepted his version of the agreement. The letter was

dated May 17, and is as follows:

> "In accordance with our recent conference at Flora on the 15th, I understand that I am to ship 6 cars of cases to the Altamont Mfg. Co. and 6 cars of cases to the Indiana Board & Filler Co., to be billed at 17½ cents per set and out of these 12 cars you are to credit me on my note $100.00 per car. After these 12 cars are shipped, I am to take the Cairo trade price less 2½ cents per case for 12 cars or more, six cars to each one of you from which you will deduct $50.00 per car until the note is paid and when the note is paid that ends the contract made June 18th, 1929, for all parties and my note is to be returned and I will be free to sell and manufacture what and where I please.
>
> "Please advise that this is your understanding of the matter,
>
> Yours very truly,
>
> think this is correct,
> A. Mfg. Co."

The letter inreference to the log settlement was in part "In accordance with our agreement, I wish to report that there are blocks (logs) bought with your money located as follows", setting forth the location. "When these blocks are used, I will pay you at the rate of $6.15 per cord for same, me to pay the transportation charges to the mill" "I figure that there was a total of 400½ cords at $6.15 making $2463.08 and against this I spent $96.75 placing 43 cords of Blair blocks on river bank at $2.25, making $96.75 and 131½ cords of Bull Island Blocks at $1.50 per cord making $197.25 or a total of $294.00. This leaves a balance to be accounted for of $2,169.00, which would amount to 352½ cords at $6.15 per cord."

After the Flora settlement, plaintiff shipped the Indiana Company twelve cars and defendant five cars, all of which were settled for and are not involved in this suit. Plaintiff then shipped defendant two cars, one of which would be in the first classification at a price of 17½ cents per case and the other car in the second price group which was to be the Cairo trade price less 2½cents per case. On the cars

in the first class, defendant was to deduct $100.00 and apply on the $5000. note referred to in the June 18th contract and $50.00 per car on the cars in the latter class.

After the delivery of the last two cars, defendant refused to pay for them and rescinded the contract as to the remaining five cars referred to in the Flora contract. Plaintiff sued to recover the sale price of the two cars, which were invoiced at $1000 and $842.50, respectively, plus damages for breach of contract arising by defendant's refusal to accept the remaining five cars under the Flora agreement, in which plaintiff claimed he would have had a profit of $176.46 per car or $882.20. He contends that all prior contracts were merged in the Flora contract and by his declaration declares upon it specifically. Defendant by stipulation was permitted to prove under the general issue all matters that he could have proven if properly pleaded.

Defendant contends that plaintiff breached the contract by shipping cases that were not of standard specifications as required by the June 18 contract. There is evidence tending to show that the last two cars of cases were of inferior quality and plaintiff told defendant on August 19 that he 'couldn't make egg cases any different' and plaintiff was then told that defendant 'could not accept any more of them'. Defendant further contends that it had the right to refuse to take the remaining five cars, that it also has a right to recoupment against the sale price of the last two cars the balance due on the $5000 note referred to in the first contract which was $453.13 and to take a further credit by charging plaintiff with one-half the logs still remaining at $6.15 per cord. On defendant's computation, it conceded there was due plaintiff $148.46 and it tendered that amount with the costs into court.

The case was tried before the court without a jury and a judgment was entered in accordance with defendant's contention. There is no controversy about the value of the two cars of cases, the total of which was $1842.50. It is agreed that on the car shipped under the first classification referred to in the Flora agreement there should be deducted $120 to be applied on the $5000 note referred to in the June 18 contract and that there should be a deduction of $55.70 on the second car, making a total deduction of $175.70. It is also agreed that the crates in the second car were made from logs referred to in the Flora agreement for which plaintiff was to pay for as used at $6.15 per cord and that there should be an allowance for the logs used of $246.53, thus making a total deduction on the two items of $422.23 and leaving a balance due on the two cars of $1420.27.

We are of the opinion that the Flora agreement was supplemental to the contract of June 18 and that both of them and all other supplemental agreements must be construed together with allowances for the changes made by the Flora agreement. By this rule of construction, plaintiff was required to furnish egg cases of standard specifications which he did not do in the last two cars. By reason of his failure to comply with part of the contract, defendant had the right to refuse to take the other five cars of cases as provided for in the Flora agreement and his refusal did not give plaintiff a right to recover anything on the five cars which were never delivered. Defendant proved that the two cars were not according to specifications and were of inferior material and workmanship but it elected to take the goods and by such action could only recoup damages for the difference between the value of the cases according to their condition at the time of delivery and their value had they complied with the terms of the contract. Defendant made no

proof as to the value of the cases in their defective condition, therefore no damages can be assessed for breach of warranty as to the quality of the cases delivered.

We find that the logs referred to in all the agreements were the property of the defendant and that the plaintiff did not agree to purchase the entire amount of logs but only to pay for the logs when used and hence was not liable to pay according to the Flora agreement until he used the logs and that defendant is not entitled to a set off on plaintiff's account by reason of the logs remaining unused.

Defendant did not make the payment for the two cars within ten days and is not entitled to a 2% discount and the plaintiff does not show such vexations and unreasonable delay as to entitle him to interest on the balance due him.

The defendant should be allowed the amount remaining due on the $5000 note which we find to be $277.43 leaving a balance of $1142.84 due plaintiff after allowing all deductions and set-offs.

For the reasons assigned, the judgment of the lower court is reversed and the clerk of this court is ordered to enter judgment in favor of the plaintiff and against defendant for the sum of $1142.84 and costs.

Reversed.

Not to be published in full.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

FEBRUARY TERM, A. D. 1934

TERM NO. 23 AGENDA 5

275 I.A. 645[4]

ESTATE OF WILLIAM LONGWISCH, deceased, APPELLANT, vs. JULIA LONGWISCH, by FRANCES GUELTIG, her Conservatrix and next friend, APPELLEE.	Appeal From the Circuit Court of Madison County, Illinois.

STONE, J:

The Appellant, Otto Longwisch, as Executor of the Will of William Longwisch, deceased, seeks to review an order of the Circuit Court of Madison County, Illinois, dismissing the appeal of Appellant from the Probate Court of that County to the Circuit Court for failure to file an appeal bond within the proper time. Certain questions are raised with respect to the power of the Probate Court to extend the time for filing appeal bonds. However, the record presents another question which would prevent our deciding in favor of the Appellant

if he were right in his position with respect to the power of the Probate Court.

The Circuit Court of Madison County entered an order on the 26th day of June, 1933, dismissing Appellant's appeal from the allowance of a claim against the estate of William Longwisch in the Probate Court. On the 6th day of October, 1933, the Circuit Court denied Appellant's motion to set aside that order and the Appellant prayed an appeal which was allowed upon filing of bond within thirty days and bill of exceptions with forty-five days, sureties to be approved by the Clerk.

On the 30th day of January, 1934, Appellant served on Aopellee a notice of appeal. On the 3rd day of February, 1934, an appeal bond was filed by the Appellant and approved as to sureties by the Clerk of the Circuit Court. No application for extension of time for filing the appeal bond was ever made.

Appellee has filed a motion in this Court to dismiss the appeal and sets forth the above facts in support thereof.

Appellant ignores the legal question presented by this state of the record, making no mention of it either in his brief or reply brief.

While we are of the opinion that no different result would be reached in this case under the Civil Practice Act, we may dispose of Appellant's contention that this case is governed by the Civil Practice Act. Rule 1 of the rules made by the Supreme Court of Illinois at the December Term, 1933, contains the following controlling provisions;

"All provisions of the Civil Practice Act with respect to review in civil proceedings by the Supreme or Appellate Courts shall apply to orders, determinations, decisions, judgments or decrees entered by trial courts on or after January 1, 1934 ..... Except as provided by this rule, or by written stipulation of parties, or by order of the Court, upon notice and motion, proceedings instituted prior to January 1, 1934 shall not be governed by the Civil Practice Act." In this case the order appealed from was entered, the appeal prayed, the time allowed for filing a bond on appeal had passed, and the appeal was without life, before January 1, 1934.

The cases are numerous which hold that the failure to file an appeal bond within the time allowed by the Court is fatal to the appeal. The case of HILL v. THE CITY OF CHICAGO, 218 Ill. 178, frequently cited, contains the following discussion:

> "The right of appeal is purely statutory and the statute granting such right must be strictly complied with. In cases where the statute fixes the time within which the appeal bond must be filed the provision is mandatory and jurisdictional, and the court from which appeal is taken is without power to extend the time .... In cases like this one the statute does not fix the time within which the bond must be filed, but requires the court granting the appeal to fix such time by its order allowing the appeal. The provision is, that the party praying the appeal shall, within such time, not less than twenty days, as shall be limited by the court, give and file in the office of the clerk of the court from which the appeal is prayed an appeal bond. If an appeal bond is not filed within the time limited by the court the appeal must be dismissed ... The statute regulating the right of appeal does not, in terms, authorize the court to extend the time limited when the appeal is allowed, but it has been considered that the court retains jurisdiction over the question until the expiration of the time limited by the order, and may, either at the term when the appeal is allowed, or at a subsequent term, before the expiration of the time allowed, extend such time. The same rule has been applied to the bond and the bill of exceptions, and it has been held that the time allowed may be extended where the court has not lost its jurisdiction, but if the time fixed in the order as made or extended has expired, the jurisdiction is lost and the act of the court in approving the bond or settling and signing the bill of exceptions is a nullity." (PP. 179, 180 of 218 Ill.).

See also, TAYLORVILLE SANITARY DISTRICT v. NELSON, 334 Ill. 510, holding that a bond filed on November 14th was fatal to an appeal where the time had been extended "to November 14, 1927".

The appeal is therefore dismissed.

Not to be published in full.